IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-281

Marcus A. Arnheiter,

Petitioner,

vs.

Neil Sheehan, Random House, Inc., and National Broadcasting Company, Inc.,

Respondents.

Marcus A. Arnheiter,

Petitioner,

vs.

Dell Publishing Co., Inc., Neil Sheehan, and Random House, Inc.,

Respondents.

Donald G. Brownlow,

Petitioner,

vs.

RCA Corporation, National Broadcasting Company, Inc., Random House, Inc., Doubleday & Co., Inc., Dell Publishing Co., Inc., Raritan Enterprises, Inc., Johnny Carson and Neil Sheehan,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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Marcus A. Arnheiter, petitioner, prays that a writ of certiorari issue to review the judgements of the United States Court of Appeals for the Second Circuit, both entered on May 18, 1979 and Donald G. Brownlow, petitioner, prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit, entered on May, 18, 1979. These cases involve identical or closely related questions and by reason thereof, a single petition for writ of certiorari is herein filed covering all three cases. Another closely related case is presently pending in the United States District Court for the Northern District of California captioned Arnheiter vs. Random House, Inc. and Neil Sheehan, No. C-72-342 S.W., returnable on

August 17, 1979, seeking an order vacating summary judgement, against Arnheiter, in a constitutional defamation case arising out of the original publication of a hard cover book entitled " The Arnheiter Affair" in February 1972. Summary judgement was entered in the California case on November 5, 1975 at which time motion to compel further discovery on the issues of state of mind of author and publisher, was also denied. This summary judgement was affirmed by the Ninth Circuit in Arnheiter v. Random House, Inc., 578 F.2d 804 (1978). The basis of said presently pending motion are recent decisions of this court and F.R.C.P., Rule 60 (b), (5), and (6). Assuming an adverse decision, the California case will again result in the filing of a notice of appeal to the Ninth Circuit and together , the filing with this court of another and

separate petition for a writ of certiorari to the Ninth Circuit, before judgement, based upon the applicable common law and statutory jurisdiction of this court.

The publication in February,1972 of the hard cover book,will hereinafter be referred to as the " California case", or the "book case ".The subsequent republication of the alleged libel on April 11, 1972 (herein designated as Arnheiter v. Sheehan in within petition) will hereinafter be referred to as the " television case"since it relates to defamation over nationwide network television broadcast of "The Tonight Show" in which Neil Sheehan was interviewed and promoted his aforesaid book. The subsequent republication of the alleged libel in February 1973 was by paper-back book (herein designated as Arnheiter v Dell in within petition)

will hereinafter be referred to as the "paper-back book case ".

Donald G. Brownlow,petitioner in the closely related case(herein designated as Brownlow v.RCA Corporation in within petition) alleges a conspiracy,in unreasonable restraint of trade and violative of federal anti-trust statutes,to supress the publication of a book written by Brownlow and contrary to the book written by Sheehan. Named respondents directly or indirectly,during the period of a continuing conspiracy, own or control,copyright or license to the Sheehan book aforesaid and or a fictional novel entitled "The Caine Mutiny" by Herman Wouk and a television and radio network of federal communication licenses with access thereto including a multi-million person

audience of television viewers for "The Tonight Show".Said promotion of the Sheehan book constituted free advertisement and a personnal attack against Arnheiter violative of the Personal Attack Rule (47 C.F.R.73.123 (1976)) and the Communications Act-1934, (47 U.S.C. 151 et. seq.)This case will hereinafter be referred to as the "anti-trust case" in which judgement dismissing the complaint and denying leave to amend was affirmed by the United States Court of Appeals for the Second Circuit on May 18, 1979.

All of these cases relate to constitutional defamation and the ability of the owners of monopolistic mass communication media to prevent a debate -dialogue while manipulating public opinion contrary to the First Amendment,United States Constitution. Also involved are the District Court's

denial of a plenary jury trial and Circuit Court affirmance, in constitutional defamation cases where summary judgement is granted as a "rule" rather than as an exception and an anti-trust complaint related thereto, is dismissed without leave to amend, contrary to applicable provisions of the federal rules of civil procedure and the decisions of this court.

Opinion Below

The opinion of Judge John M. Cannella dated September 11,12, 1978 granting summary judgement in both defamation cases are unreported and are set forth in Appendix A infra. The opinions of the Second Circuit Court of Appeals is unreported and are set forth in Appendix B and C infra. and are both dated May 18,1979. The opinion of Judge John M. Cannella in the "anti-trust case" dismissing

the complaint,dated November 6, 1978, is unreported and is set forth in Appendix D infra.The opinion of the Second Circuit Court of Appeals is unreported,dated May 18,1979,and is set forth in Appendix E infra.

With reference to the "California case", the opinion of Judge Spencer Williams is unreported, dated October 31, 1975 and is set forth in Appendix F infra.The opinion of the Ninth Circuit Court of Appeals reported in 578 F.2d 804 and also appears in Appendix G infra.No petition for a writ of certiorari to this court was filed with reference thereto,however motion to vacate said judgement is presently pending before Judge Williams, scheduled for decision,August 17, 1979, and is based upon the following recent decisions of this court; Herbert v.

Lando, (April 18, 1979) ___ U.S.____, 47 U.S.Law Week 4401,Wolston v. Readers Digest Association, Inc. (June 26,1979) ___ U.S.___, 47 U.S.Law Week4840 and Hutchinson v. Proxmire (June 26, 1979) ___ U.S.____, 47 U.S.Law Week 4827. Said motion to vacate summary judgement is also based upon F.R.C.P.,Rule 60 (b) (5), (6).

Jurisdiction

The judgements of the Court below were all entered on May 18, 1979.The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. Sect. 1254(1).

Questions Presented for Review

1. Whether summary judgment should be granted in constitutional defamation cases as rule rather than as an exception, consistent with harmonizing the First, Fourteenth and Seventh Amendments of the Constitution of the United States of America.

2. Whether defamatory republication with litigation pending gives rise to a jury issue as to actual malice.

3. Whether there is absolute immunity for constitutional defamation published by television broadcast and book containing vituperative statements of fact, fiction and opinion knowingly false or made with reckless disregard of truth.

4. Whether a complaint alleging a conspiracy in violation of antitrust statute with overt act in furtherance thereof within limitations

period, should be dismissed where leave to amend is pending and there has been no discovery as to other concealed overt acts unknown to petitioner at the commencement of action.

5. Should summary judgment be granted in constitutional defamation case where pre trial discovery is incomplete.

6. Whether the denial of media access in broadcast journalism involving a personal attack violative of Federal Communications Commission Rule gives rise to a jury issue as to actual malice.

7. Where the issue is state of mind and actual malice is not the better procedure to allow a jury trial, rather than, grant summary judgment, and thereafter allow trial court the discretion of entering judgment notwithstanding verdict so as to afford a complete record for appeal.

Constitutional Provisions and Statutes Involved
(set forth in appendix H infra.)

1. The First Amendment, United States Constitution.

2, The Seventh Amendment, United States Constitution.

3. The Fourteenth Amendment, United States Constitution.

4. Communications Act of 1934, 47 U.S.C sect. 151 et. seq..

5. Personal Attack Rule, 47 C.F,R, sect. 73.123 (1976).

6. 15 U.S.C sect. 1 ,12,13,15,15(b),18, 22

7. 28 U.S.C sect. 1254

8. 10U.S.C. 822,832,935

9. Fed. Rules Civ. Proc. Rules, 26,37, 50,56 28 U.S.C.

10. Fed. Rules of Evidence, Rule 404, 28 U.S.C.

Statement of the Cases

Petitioner Arnheiter, a former commander of a navy warship had been summarily removed after serving as such for ninety nine days, off the coast of Vietnam, during the war. He assumed command on December 22, 1965 and was relieved on March 31, 1966.

Arnheiter retired from active duty in the U.S. Navy in 1971 and returned to civilian life, and became gainfully employed selling insurance and residing with his family in Novato, California.

After being relieved from command, petitioner attempted to regain a command, by exhausting adminstrative and legal remedies, attempting to have a courts martial or court of inquiry convened to obtain a full hearing into his conduct as well as that of certain junior officers serving under him on the warship and some senior officers as to their conduct

in preventing same. These efforts extended from March 31, 1966 until 1970, when he lost his appeal seeking a court order to compel the Secretary of the Navy to convene a court of inquiry or courts martial. He lost due to lack of jurisdiction, Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) affirming Arnheiter v. Ignatius, 292 F. Supp 911 (N.D.Cal 1968).

Upon his relief from command, the U.S. Navy held an informal one-officer hearing on April 6, 7, 8, 9, 11, 12 and 13, 1966, at Subic Bay. Thereafter the procedings went through channels without petitioner being restored to a command of a warship. A Captain Witter had presided at the Subic Bay hearings.

In May 1968 Arnheiter seeking to persuade the Navy to convene a Court of Inquiry or Courts Martial, participated in Congressional ad hoc hearings.

These hearings were attended by Neil Sheehan, who was the Pentagon correspondent for The New York Times. Sheehan later edited stolen classified documents published as "The Pentagon Papers" which the government tried to prevent publication of on the basis that classified information should be kept so.

Respondent Sheehan had, during the adhoc Congressional hearings, reported favorably on Arnheiter for The New York Times. At the conclusion of the Ad Hoc hearings in Congress, the U.S. Navy, which had not participated therein contacted Sheehan, who thereafter publicized canards about Arnheiter to discredit him.

Arnheiter, with good evidence, had maintained that his relief had been as a result of a mutiny conspiracy by several junior officers in his command, including Tom Generous, who had been the operations officer. The U.S. Navy's position then became that petitioner was not fitted for command and that his relief was necessary at the time, that

petitioner was unfit to command a warship and had been properly relieved.

On August 11,1968, Sheehan published in the Sunday magazine section of The New York Times, an article entitled "The 99 Days of Captain Arnheiter ",(S.A.508a). This article was highly critical of petitioner and drew analogies to a fictional novel "The Caine Mutiny " by Herman Wouk.

Respondent Sheehan using this magazine article as the genesis,began to write a book.After The New York Times indicated that it was not interested in being the publisher,Sheehan obtained a contract and monetary advance from W.W.Norton & Co .Inc."Norton",after expending considerable money and editorial effort thereon , upon advice of counsel refused to publish the

book and terminated said contract. Arnheiter having learned of the book had previously written letters to"Norton" threatening to sue for libel if it published the book.Petitioner had also written such letters to The New York Times.(S.A.232a,233a,282a,286a, A.421a-A425a wherein Sheehan had on 9/12/68 stated "..!Mad Marcus' a paranoid captain a real life Queeg...") Norton refused to publish the book written by Sheehan ,after entering into a contract dated August 9,1968 to do so. (A.373a).Termination agreement was dated January 5,1971.(A.386a)The manuscript had been reviewed by Thomas,Onysko and Swenson, editors for "Norton," as well by its attorneys, before it was rejected.The basis for rejection was concern about libelous content.(A.368a,369a,374a,375a,376a,377a, 378a,379a,380a,381a,382a,383a,384a,385a, 387a,388a,389a,390a,391a,392a,No 78-7538

and 75 -7539 combined appendix in 2d Cir.)

Sheehan thereafter entered into a contract with respondent Random House, Inc. and with the editorial aid of Robert Loomis, and its attorney Joseph Kraft, the book was published February 1, 1972 entitled "The Arnheiter Affair". On February 25, 1972 litigation was begun in the Northern District of California (S.A. 125a)

Shortly after the hardcover book was published, petitioner Donald Brownlow, who had begun his own investigation in 1968 after reading Sheehan's magazine article, had a telephone conversation with Sheehan in early 1972. Brownlow reviewed his investigation and book with Sheehan, having reached a conclusion contrary to Sheehan's. Sheehan at that time attempted to discourage Brownlow from publishing his book, and all efforts to have the book published have, in fact, failed to date.

Brownlow has unquestionably been denied access to both print and broadcast journalism although his book and investigation preceding its writing were well known to Sheehan and Random House, Inc. (A.872a-A.882a).

Thereafter with litigation pending in California, respondents republished the defamation on April 11, 1972 during an interview concerning the book and its commercial promotion, between Sheehan and Johnny Carson, over National Broadcasting Company, Inc. ("NBC") network television facilities on "The Tonight Show" to an estimated seventeen million viewers. This broadcast constituted a personal attack upon Arnheiter in which neither he nor Brownlow, nor any other spokesman, was given access to the media. (A.872a-A.882a, A.855a-A.871a) This defamation resulted in the second litigation being filed in the Southern District of New York,

bearing No.78-7539 in 2d Cir.,on June 20, 1972 (A.445a)

Sheehan and Random House,Inc. entered into a contract to republish the book as a paperback dated (S.A.593a) May 5,1972 and the book was republished without any editorial revision, and two defamation cases pending, in February 1973.This resulted in the third litigation, No.78-7538 2d Cir. which was filed on July 30,1973 (A.2a),after petitioner had attempted to first file these allegations as a supplemental pleading to the first New York action,on March 20, 1973 (A.446a)which the court denied on June 1, 1973,(A.516a-A.521a)

Thereafter and prior to the petitioner Arnheiter's completion of pre trial discovery,summary judgment was entered in favor of respondents

Sheehan and Random House, Inc. (A.718(r)a, on Nov. 5, 1975, based on opinion of court (A.718 (a)a-A.718(q)a). That opinion was affirmed by the 9th circuit in Arnheiter v. Random House,Inc.,578 F. 2d 804(1978). No petition for writ of certiori was filed with this court. A motion to vacate said summary judgment is, however, presently pending in the Northern District of California before Judge Williams. It is based upon recent decisions of this Court.

Prior to the completion of pre-trial discovery and with motions to compel same pending and after the trial court had twice denied summary judgement, once on March 16, 1978 (A.358a-A.361a) and again shortly before the cases were both called for trial, on October 2,1978 summary judgment was entered after reconsideration by the court. (A443a as No 78-7538 2d Cir.) and (A.933a as No.78-7539 2d Cir.) based upon oral opinion of court delivered

on September 11 and 12, 1978 (S.A. 1a-S.A.115a) at the conclusion of petitioner's argument and opening statement, both made out of the presence of a jury which had not as yet, or ever, been empaneled.

On June 12, 1978 petitioner Brownlow filed his complaint alleging a conspiracy in violation of antitrust laws to supress his book and deny to him accesc to both print and broadcast journalism.(A.1a-A.27a). The complaint alleged a continuing conspiracy from early 1972 to the present time. It further alleges as an overt act in furtherance of said conspiracy, a merger between respondent Dell Publishing Co.Inc., and Doubleday & Co. Inc. effective June 1, 1976.The complaint further alleges that included among the purposes of said conspiracy was the massive promotion of a book entitled"The Arnheiter Affair" by respondent Sheehan as a sequel to

book entitled "The Caine Mutiny " written by Herman Wouk and published in 1951 by "Doubleday". The complaint further alleges that respondent RCA Corporation, a mass media corporate monopolistic conglomerate, owning, through subsidiary corporations, print journalism, respondent Random House, Inc. and broadcast journalism respondent National Broadcasting Company, Inc. so dominates the promotion of the mass market for literary products including books and adaptation for television , and motion pictures as to have persuaded the other named respondents, "Doubleday" and "Dell" to cooperate in denying to petitioner Brownlow access to print and broadcast journalism so as to thereby enhance the joint promotion of books that each of the respondents had a copyright or license interest therein. Further alleged as a technique for such monopolistic domina-

tion of the other publishers in the industry is the availability of free television advertising to an estimated seventeen million person audience of "The Tonight Show", produced by respondent Raritan Enterprises Inc.,owned in part and otherwise controlled by respondent Johnny Carson.

Shortly after the complaint was filed, prior to any responsive pleadings or any pre trial discovery,motions to dismiss were filed on behalf of all respondents. (A.30a,116a,262a,267a No 79-7002 2d Cir.) Petitioner Brownlow filed an affidavit in opposition to these motions to dismiss, arguing that the statute of limitations was not applicable as the complaint alleged a continuing conspiracy with an overt act effective June 1, 1976.(A.1a-A.27a).

Petitioner Brownlow further contended in his affidavit in opposition (A.168a-A.247a) that the statute of limitations was tolled by reason of pending related government antitrust actions captioned; U.S.A. v NBC,(N.D.Cal.) Civil No.74-3801 RJK annexing thereto the competitive impact statement (A.172a-A.197a),and also relying upon the still pending case of U.S.A. v CBS Inc. S.D.N.Y. Civil No 78 Civ. 2491 filed June 1, 1978 (A.198a-A.203a)Petitioner Brownlow further annexed thereto statements by Herman Wouk to U.S.Senate on behalf of The Authors Guild,(A.205a-A.225a) and its attorney Irwin Karp Esq.(A.226a-A.247a) both of which recognize monopolistic impact of mass communication conglomerates owning both print and broadcast journalism.

Petitioner Brownlow in his memorandum

filed (A.248a -A.255a) requested leave to amend the complaint if needed to allege a more recent and timely overt act.This request was ignored by the trial court when judgement dismissing the complaint was entered on November 29, 1978 (A.283a). Motion to amend was made to the 2dCir. and was also ignored in their affirming decision handed down on May18, 1979. See also petitioners brief filed with 2d Cir. pp. 12-17 wherein was argued;

> "...Assuming,perarguendo, that the complaint required more specificity to remove statute of limitation bar, the trial court erred in not so ordering plaintiff to so clarify with such additional specificity,and appellant now moves this honorable court to reverse dismissal judgment and remand to allow amendment held to be required....."

Petitioner Brownlow in his trial memorandum stated (A.251a) as follows;

> "...If needed plaintiff request leave to amend his complaint to include the date of the most

recent rejection by defendant "Doubleday"..."(i..as late as 1976 ...')(parenthetical insert supplied to indicate accurate quotation but in inverted order)

> "...The complaint should not be dismissed. If needed plaintiff should be afforded now or after pre-trial discovery to have an opportunity to amend the complaint. Not all of the overt acts in furtherance of alleged conspiracy are presently known to plaintiff since by its very nature defendant participation is largely concealed ..." (A.253a)

All three actions are the subject of this petition for a writ of certiorari to Supreme Court of The United States.Petitioners both are unaware that there exists any absolute immunity from federal anti-trust statutes to mass media communication conglomerate or its wholly owned subsidiary corporations.Indeed the legal monopoly of a communication frequency broadcast license is subject to the duty not to engage in a conspiracy to monopolize under penalty of loss of license,

In the book entitled "The Arnheiter Affair" by Neil Sheehan,(Dell,paperback book, complaint-1, Exhibit A No.78-7538)

page 1,"... Mad Marcus...","...fetish..."
"...craziness..."
page 16,"... paranoid..."
page 43,"...bizarre ..."
page 67,"...obsessed..."
page 113,"... queerest happenings ..."
page 124,"... eerie..."
page 136,"...idiocy..."
page 156,"... fantasies..."
page 162,"... he's crazy...get the ball bearings ... madness..."
page 167,"... absurdity..."
page 171,"... helter skelter type..."
page 172,"... lost in some reverie... incoherent replies..."
page 180,"... the captain's orders violated reason..."
page 182,"... the captain was mad..."
"... Arnheiter was psychotic..."

page 183,"... debate the insanity... of instructions..."
pages 184-185 "...Arnheiter's non technical mind had difficulty comprehending the situation..."
page 185,"... the captain seemed unable to separate personalities from events ..."
page 189,"... he's paranoid.He's too stupid to know what's going on, but he's so paranoid he cares what people think of him... it's prime cause is insane..."
page 193,"...Marcus is an oily criminal bastard..."
page 193,"...the Marcus Madness log..."
page 206,"...ignoramus..."
page 216,"... that crazy fucker..."
page 217,"... that damn fool Marcus..."
page 221,"... a nut in command..."
page 244,"...bizarre..."

page 257,"...The captain took naturally to fraud because his mind had difficulty distinguishing reality from delusion and right from wrong.The deliberate lie blurred into the unconscious fantasy..."

page 259,"...The psychic reflexes of his mind..."

page 277,"...Arnheiter's bizarre record..."

page 278,"... screwball tendencies..."

page 281,"... Arnheiter might run amok..."

page 285,"...psychologically dangerous..."

page 298,"... A court martial would in fact have been a grotesque process for meting out retribution to Captain Arnheiter.To punish a man for transgression of the law is to presuppose that he can distinguish right from wrong. In Arnheiter's mind,right and

wrong deception and candor, fact and fantasy,tumbled together like colors in a kaleidoscope.He stole and deceived knowingly,but a mad innocence.And he was never conscious of his greatest crime, goading other men to near madness. He was a figure of fiction,that whimsical tyrant in the captain's cabin who emerges at some point in every navy. No admiral credits his existence,until he appears. Captain Queeg was a character in a novel.Captain Arnheiter was alive and in command of the U.S.S.VANCE. Once relieved he had to invent a conspiracy because psychologically it was the only way he could explain his disgrace to himself..."

page 300,"... Queeg's madness..."

page 354,"...The Caine Mutiny was fiction, The Arnheiter Affair is fact..."

Television Broadcast "The Tonight Show", April 11, 1972 over National Broadcasting Company, Inc,,network to an estimated seventeen million viewers (amended complaint-19,exhibit annexed ,No.78-7539) compare the following excerpts

(pg.1)

CARSON: "... David asked one interesting question.We were discussing your book before you came out during the commercial. And David asked what is- have you heard from Arnheiter since you've written the book? He wondered what his reaction to your bock was.

SHEEHAN: I haven't heard from him personnally,but he's sued me and Random House and the New York Times for five million dollars.

CARSON: Then he's unhappy about the book. He didn't say:"Good Job Neil" For five mill-he's trying to tell you something ...

(pg.2)

SHEEHAN: ... It's his fifth suit.

CARSON: Is that right? Well,now you know what his reaction to your book was.

(pg.16)

CARSON: No comment.You say he's suing you?

SHEEHAN: Yes.

CARSON: On the basis of what? That you have libeled him,held him up to ridicule,etc.?

SHEEHAN: Yes,a number of charges like this, we have libeled him,we

have libeled him, we've held him up to ridicule,etc. This is his fifth suit and he's gone through several lawyers. He has never... He's a somewhat litigious man in the legal phrase, I think. He's never won a suit or gone anywhere with one.The only suit that was ever taken anywhere was a suit he made against the Navy. He sued the Navy for violation of due process and he lost that one with what would be really prejudice in the federal district court out in San Francisco.So I'm not worried about the suit.It's a specious suit...."(emphasis supplied,defamatory arrogant reference to pending litigation yet to be determined by this court,which reference fails

to reveal respondents' economic interest therein,as required by Communication Act,47 U.S.C. sect. 151 et.seq. and regulations promulgated pursuant thereto, 47 C.F.R.)

(pg.15)
CARSON: ... What's he doing now?

(pg.16)
SHEEHAN: He's in the insurance business as far as I know. He's selling insurance.

CARSON: No comment...."(defamatory reference to petitioner's efforts at gainful employment, which upon review of the audio video tape reveals Carson's facial expression which invokes laughter,an interference with business relationship beyond First Amendment)

(pg.5)...
CARSON: Did this happen as soon as he took command of the ship?Or was it a gradual type of thing that evolved,or was the behavior--I don't want to say paranoid because that's a bad word to use for laymen,but say, strange, to begin with? (emphasis supplied)

(pg. 6)
SHEEHAN: Well,there were strange things occurred,yes right away and people reacted to them differently. What it amounted to was the injection of irritation, irritants, physical exhaustion and fear into the crew of a ship when confined to the sea. It started out with strange things and irritants first of all, like 4 minutes and 10 seconds of bugle calls....He wanted to

get involved in the war.These are the kind of irritants.

CARSON: That would irritate you I think for openers. ...

(pg.10)
SHEEHAN: I observed this strange behavior. .... (emphasis supplied)

(pg.12)...
CARSON: That's strange. ...

(pg.13)...
I guess the word would be disturbed."? (emphasis supplied)

SHEEHAN: No,they never did. You see, once they started out on this track,no court martial and no judicial punishment,they were in effect trapped by their own procedures.This was the first case .... they couldn't order him to a psychiatrist later on when he had made a public controversy ... "

Reasons For Granting The Writ Of Certiorari

1) Where the United States Court of Appeals For The Second Circuit affirmed summary judgement granted by District Court in constitutional defamation cases, where pre trial discovery by deposition of author and editor are pending with questions on the issues of motive,intent, knowledge,state of mind on the issue of actual malice are unanswered or evasively answered,thereby rendering a decision on a federal question in a way in conflict with applicable decisions of this court and the federal rules of civil procedure.

Compare; Herbert v. Lando, ___U.S.___ 99S.Ct. 1635,Hutchinson v.Proxmire, ___U.S.___ 99S. Ct. 2675,Wolston v Readers Digest Association, ___ U.S.____ 99 S. Ct. 2701 (1979)

2) Where at the time of the hard cover book in February 1972, depicting his conduct as U.S. warship captain off Vietnam in 1966,petitioner, having been retired from active duty in 1971,and returned to civilian life, his attempts to exhaust available adminstrative, and legal remedies,did not preclude his becoming a private person.Assuming per arguendo,petitioner was a public person,he was not such for all purposes and for all time,and a decision of the District Court,affirmed by the United States Court of Appeals for the Ninth Circuit,which is relied upon as res judicata and collateral estoppel by the Second Circuit,affirming the District Court's granting of summary judgement on trial date,having previously denied summary judgement based upon said doctrines,set forth

in Appendix A(i) infra,which summary judgement relates to defamatory republication of the libel, a "personal attack" over nationwide network television in April 1972 and again republished in February 1973 by paper back book,which republications are made with litigation pending, a decision has been rendered on federal questions in a way in conflict with applicable decisions of this court and decisions made on important questions of federal law which have not been,but should be settled by this court relating to constitutional defamation, media access,and other distinctions between print and broadcast journalism and the applicability of violations of the Communications Act (47 U.S.C. 151 et. seq.) and the Personal Attack Rule(47 C.F.R. 73.123 (1976)) as creating an inference of actual malice for a jury.

Respondents have failed to allow petitioner to complete his discovery,by using a pattern of evasiveness which was tolerated by the trial court although the subject of repeated motions. Compare A.35a,40a,32a,134a, and motion to compel discovery,A218a and affidavit in support thereof,A.251a, and moved again (A.642a)

The death of the assigned Magistrate to whom the motion had been referred for consideration,further delayed completion of discovery.See report of Magistrate(A.331a). Petitioner then objected to the Magistrate's report(A.340a-344a).The trial court confirmed the report of the Magistrate(A.345a). Petitioner again moved to compel discovery (A.351a)and it was denied by the District Court, (A442a-443a)

Petitioner first moved to compel discovery by motion before the late Magistrate Hartenstine returnable January

12, 1976 (A.218a) and as a result of his death it was necessary to file a new motion to compel discovery with Magistrate Raby, returnable September 3, 1976 (A.642a).

The denial of discovery, coupled with denial of a plenary jury trial, prejudiced petitioner's ability to prove actual malice. While depositions and interrogatories are no substitute for cross examination of witnesses, incomplete discovery and no plenary jury trial further prejudice petitioner by subjecting him to an appeal without a record to rely upon. A review of the several motions to compel discovery will clearly demonstrate that the lower courts have failed to comply with this court's decision of Herbert v. Lando, ____U.S.____, (1979) 99 S.Ct.1635. To the extent that petitioner was unable to

more clearly demonstrate to Judge Canella, evidence of actual malice arising subsequent to the first book publication, it was as a result of incomplete discovery. Questions unanswered during depositions, however, petitioner was prepared to ask of respondents during the plenary trial. By granting summary judgement on the trial date the District Court left the record below almost barren of respondents' answers on the issues of knowledge, motive and state of mind.

As an example of the difficulty of attempting to try the issue of actual malice without benefit of complete discovery or a plenary trial see the following other defamatory statements made by the author and set forth in R-63, Plaintiff Memorandum of Law In Opposition to Defendants

Second Motion for Summary Judgement, exhibit numbers are attachments thereto) Exhibits number 21 and 22 wherein the author in his own handwriting attempts to draw analogies between fictional "Queeg"and real life Arnheiter.During his depositions the author admits these notes were made by him "...before submission of N.Y.Times magazine article ..." (magazine article "The 99 Days of Captain Arnheiter" dated August 11,1968 exhibit number 20 in R-63,was the genesis of the book.

Compare Sheehan deposition May 24, 1974, R-65,p.260 to p. 264,and his deposition of August 19, 1975,p.437 to p.466 and after his lunch recess,p.470 to p. 471. At a plenary jury trial Sheehan's wife would be called as a witness,with reference to her hand written notes on"The Caine Mutiny". Those notes do contain on p.453 "...MAA...

psycho..." Exhibit-13, R-63 wherein Sheehan states "...Arnheiter was Queeg..." Exhibit 61, R-63 wherein reference is made to Sheehan as having ".. undoubtedly joined the ranks of the Grand Conspiracy..." See also R-63, exhibit-56 wherein Sheehan is congratulated ".. how courageous you were in giving your opinions re MAA's psychic processes...". Both of these exhibits 61 and 56 are postcards from Tom Generous,then operations officer of the USS Vance.See also R-63 exhibit -25 wherein Sheehan in memo dated September 14,1968 refers to petitioner as follows; "...They tell of a paranoid captain, a real life Queeg ...."R-63, exhibit 26 wherein Sheehan in a letter to the New York Times dated December 3,1968 refers to petitioner as being "... the Mad Commander...".

A review of the entire document R-63 and and the 72 exhibits annexed

and the seven affidavits annexed clearly set forth genuine material fact issues for a jury on actual malice.For the lower courts to have granted summary judgment for respondents and affirmed is to have applied a non existent "rule" in constitutional defamation cases. Fed.R.Civ.P. 56,Adickes v. S.H. Kress & Co., 398 U.S.144.See 10 Wright & Miller, Federal Practice and Procedure sect. 2730 at 590-592,because the law is that the petitioner is entitled to all inferences and presumptions which may reasonably be drawn from the evidence as the granting of a summary judgment is the exception. This court should grant certiorari to clarify this law.

As of January 5, 1976,a review of the deposition transcripts of Sheehan (R.-50,51,52,64 and 65-72 Civ.2801, 78-7539)there are approximately 129 pages , or approximately 2,966 lines of argument by attorneys on behalf of respondents.In addition to the almost argument of counsel,Sheehan,himself, delayed the completion of his depositions by restating almost each question asked and thereafter seeking clarification. (A.253a-254a)

As to the issue of respondents' reaction to pending litigation,relative to state of mind,the depositions of the author, Sheehan, and editorial persons,Loomis(Random House,Inc.) (R.-59 and 60,72 Civ. 2801,78-7539), Thomas (W.W.Norton& Co. Inc.) (R.-55 and 56),Swenson ("Norton")(R.-57), Onysko ("Norton") (R.-58), are all incomplete.Petitioner also sought to

take the depositions of Joseph Kraft Esq. and to inspect ,and use during depositions, files marked"privileged", (A.351a-355a).Respondents', while asserting the attorney client privilege, disclosed only those portions of communications as were self serving, using the privilege as a shield to prevent completion of discovery;on this issue,of state of mind and actual malice. Fed. Rules Evid.,R. ,404,28U.S.C.

Petitioner claimed, but the lower court rejected, that if there was a valid claim of privilege,it was lost by disclosure in whole or in part to third persons or during the litigation.Consider:after claim of attorney client privilege,upheld by the trial court, respondents' file and serve an affidavit by Joseph Kraft Esq.(S.A. 585a-590a)To the same

effect compare Sheehan's partial disclosure of communications with attorneys for "Norton" at about the time it had decided not to publish the book.(A.368a,A369a, A.390a,A.A.391a,A.392a)

The decision of "Norton" not to publish the book is relevant on the issue of entertainment of doubt and actual malice.St Amant v. Thompson, 390 U.S. 727 (1968) where this court stated on page 732 "...Neither lies nor false communications serve the ends of the First Amendment....

> The defendant... cannot... automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.... Professions of good faith will be unlikely to prove persuasive,... where a story is fabricated.... nor will they be likely to prevail when the publisher's allegations are so inherently improbable...." (emphasis supplied)

This court should grant certiorari to clarify the law as to whether a claim of privilege can be used to frustrate complete discovery on the issue of actual malice.Again had there been a plenary trial the record would at least contain an offer of proof and a ruling by the trial court.In the presence of a jury, tactics of evasiveness,as demonstrated during depositions,is at the high risk of loss of credibility. This court has jurisdiction,particularly in constitutional defamation cases,to ensure lower court compliance with the letter and spirit of discovery rules. Fed. Rules Civ. Proc.,R. 37,26(c),28 U.S.C., Hickman v. Taylor, 329 U.S. 495

2.) Where the United States Court of Appeals has decided a federal question in conflict with the First Amendment, United States Constitution,applicable decisions of this court, federal statutes and the federal rules of civil procedure, by affirming District Court judgement dismissing complaint,based upon expiration of statute of limitations, which complaint alleges a continuing monoplistic conspiracy among various owners of print and broadcast journalism,without granting requested leave to allege timely overt act,prior to responsive pleading and pre trial discovery, there has been such a departure by the lower courts from the usual course of judicial procedure, as to call for an excercise of this court's powers of supervision.

The lower courts have dismissed the complaint filed by petitioner Brownlow contrary to the decisions of this court and federal rules of civil procedure and applicable statutes. There is no requirement that said pleading be with particularity.Compare Fed. Rule Civ. Proc. 8 and 9, 28 U.S.C. .

Petitioner alleged a continuing conspiracy tothe present time in which specific acts were alleged. The overt acts include the June 1,1976 merger of "Dell" into "Doubleday" in furtherance of said conspiracy. The 2d Circuit concluded in affirming the trial court dismissal of the complaint based upon the expiration of the statute of limitations,15 U.S.C. 16 (b).The pleadings allege that the conspiracy had as its purpose the joint promotion of "The Caine Mutiny" novel and its sequel "The Arnheiter Affair" which all

respondents would profit from by reason of their relationship with each other and interest in copyrights and licenses for either or both of said books.

For this conspiracy to succeed, petitioner Arnheiter had to remain in character as a real life "Queeg"- a paranoid captain.Sheehan's book was being widely promoted in this manner , using network radio and television interviews with Sheehan as well as printed advertisement.(compare respondents answers to petitioner Arnheiter interrogatories Nos.78-7538, 78- 7539,A.532a-A.554a for Random House,Inc, A.555a-A,574a,for "NBC" and A.575a-A594a,for Sheehan,and A.82a-A.134a,for "Dell") With reference to the hardcover book see R.-63,exhibits annexed numbers 23,26,57,63,64,65,66, 67 and 68 Nos 78-7538 ,78-7539)

It was also necessary, if petitioner Arnheiter was to remain in false character of a real life "Queeg", - a paranoid captain, that he not be subject to the scrutiny of a Court proceding and to this end Sheehan obtructed Arnheiter's attempt to have the President of the United States convene a courts martial or court of inquiry. (R.-63 exhibits annexed number 8,9,10, 11,12 and 13 ,Nos. 78-7538 and 78- 7539, also set forth in appendix as A.789a - A.820a)

Consistent with this common scheme and motive a book and spokesman petitioner, Brownlow, and his book entitled "The Albatross," had to be supressed and the author denied access to print and broadcast journalism. Another book concluding that Arnheiter had been the victim of a mutiny in a war zone, which the U.S. Navy desired to cover up and did so with

the aid of Sheehan.

See Brownlow's affidavit not contradicted in the record below that his book was supressed and he was denied access to the media and that respondents know of his investigation and his book. (A.872a-A882a Nos. 78-7538 and 78-7539).

Pleadings are to be liberally construed. Beacon Theaters Inc. v. Westover, 359 U.S. 500

The Federal Rules of Civil Procedure, particularly as they relate to pleadings were intended to achieve substantial justice, U.S. v. Hough, 364 U.S. 310. The function of notice pleading is to allow facts-- characteristically concealed in a conspiracy-- to be revealed during pre-trial discovery. Hickman v. Taylor, 329 U.S. 495. The lower courts failed to accept complaint allegations

as truc,Fed. Rule Civ. Proc. 12,28 U.S.C.

The lower courts also failed to grant petitioner Brownlow leave to amend the complaint to allege a more recent overt act"... infurthorance of alleged conspiracy "Doubleday" rejected plaintiff as late as 1976.If needed, plaintiff requests leave to amend his complaint to include the date of most recent rejection..." (A.251a and compare A.253a)

The request to amend was contained in petitioner's memorandum in opposition to respondents' motions to dismiss.It was ignored by the trial court.The same motion was made to the 2nd Circuit and ignored. This court should grant certiorari to obtain compliance by lower courts with rules of procedure and decisions of this court. Compare Fed. Rules Civ.Proc. 15, 28 U.S.C., U.S. v. Loews,Inc. 371 U.S. 38 47 U.S.C. 312,313,314 and 315 ,Watson v. Buck, 313 U.S. 780,Straus v American Publishers Assoc.,231 U.S. 222

During the television broadcast, inquiry was made in a defamatory context as to the means by which petitioner was gainfully employed. Here the facial gestures which resulted in laughter is missing fromthe record because both the trial court and appellate court denied petitioner's motion seeking to compel production of audiovideo tape of the April 11, 1972 broadcast. Assuming per arguendo, petitioner was a public person at that time,this court, has not yet, defined whether he was such for purposes of means of employment. (S.A. 519a-536a,particularly A.533a) "...Carson:What's he doing now?
Shechan: He's in the insurance business as far as I know. He's selling insurance.
Carson: No comment...."
(TV Tr. pp. 15-16,A.534a)

Respondents' had previously been warned

about how the defamation would adversely effect petitioner's insurance business.(Compare;R.-63,exhibits, 2, 3, 49,50,51 and 52 annexed,72 Civ. 7601; 78-7539 also A.821a,A.332a-854a, affidavit of petitioner's son Jeffrey, A.855a-A.871a,being affidavit of petitioner,wherein he indicates that as a result he lost his employment).

Respondents' also defamed the petitioner's family and even his dead grandfather, whom Sheehan suggested,was an early inventor of the airplane-as a figment of the imagination of the paranoid petitioner. In reality Sheehan could have found corroboration by checking the files of his once employer,The New York Times (A.854a,A.855a-A.871a,A.832a-854a)(See also petitioner's reply brief in 78-7538, 78-7539,pp.1,18,20,22, and 23.) (A.439a A.441a,A.845a-A.A.847a,A.872a- A.882a,pp.303-304 of the book.)

Brownlow's affidavit ,uncontradicted, and thus deemed admitted states that Sheehan was aware "shortly after Sheehan's book had been published,in 1972" of his investigation including factual errors therein which were not changed in either the broadcast on television in April 11, 1972 or the paperback book in February 1973. (A.872a-882a)

A review of the Brownlow affidavit (A.872a-A882a) raises a jury issue, ignored by the lower courts,in the instant petition,as to respondents' knowingly continuing with actual malice to make false defamatory statements as follows; Book p.p.303-304 petitioner delusion of grandeur as is expected of a paranoid,as to his late grandfather,who in fact and truth was an early airplane inventor according

to United States Patent office records (R.-63 exhibit-53)(A.441a) Book p. 46"...The court drummed Arnheiter out of the Boy Scouts..." Sheehan knew no such procedure ever existed in the Boy Scouts of America, and Brownlow had so informed him. Book p.47 Arnheiter is described as graduating at the bottom of his class. Sheehan knew and had been so informed by Brownlow that infact petitioner had graduated"with credit"(A.440a)

Petitioner is aware that a petition for a writ of certiorari should not involve a detailed discussion of the evidence below,but that is the dilemma,resulting from the lower courts creation of a "rule" where summary judgment is granted routinely in constitutional defamation cases where denial of discovery is tolerated and thereafter a plenary jury trial denied. Actual malice,

state of mind, motive of respondents' are in reality jury issues,the lower courts by denial of a plenary trial have forced petitioner to attempt to demonstrate his complaint is not frivolous, as Judge Cannella,so held, (A.347a)but thereafter on the trial date in contradiction, granted summary judgment for respondents', while ignoring the repeated motions of petitioner to compel and complete discovery.(A.933a)

Herbert v. Lando ___U.S.____, 99S.Ct. 1635,(1979) was not obeyed in the instant petition,although argued and briefed in the District Court and Second Circuit. Denial of pre trial discovery motions are interlocutory orders and are preserved for appeal from a final judgment. Petitioner requests this court review the record below; thereafter grant the

petition- writ of certiorari to the end that the law may be settled that the First Amendment,important as it is ,in preserving an open society, does not reveal petitioner's right to a plenary jury trial under the Seventh Amendment.The common law tort of defamation pre-dated the enactment of The Constitution of the United States. John Peter Zenger,(1735) Vol. 16,p.1,American State Trials,Lawson,J.. Thomas Law Book Co.,St.Louis,1928

In constitutional defamation cases the issue of actual malicecan not be tried by affidavits, interrogatories and deposition,which even if completed and fully responsive, fail in comparison to cross examination of witnesses in a plenary jury trial,in the discovery of truth.The penalty for evasiveness in a plenary jury trial is loss of credibility while in a deposition

must await a motion and a court order to compel response.

The First and Fourteenth Amendment should be contrued together with the Seventh Amendment. New York Times Co. v. Sullivan, 376 U.S. 254(1964) and Curtis Publishing Co. v,Butts, 388 U.S. 130 (1967) while they did effect changes in applicable standards in constitutional defamation actions,did not , and could not,dispense with the constitutional right to a plenary jury trial,under the Seventh Amendment.The lower courts,by "rule" particularly in the Second Circuit,apply, as in the instant petition,the granting of summary judgment,although genuine jury material fact issues exist as to actual malice, state of mind,knowledge of falsity, reckless disregard of truth, and motive. Herbert v. Lando,__ U.S.___,99S.Ct. 1635 (1979) clarified the necessary right to

complete discovery on the state of mind of author, editor and publisher. This court should in the instant petition, clarify the law to the effect, that summary judgement is the exception and not the rule even in constitutional defamation cases. Indeed the better rule, consistent with the Seventh Amendment, would be to grant a plenary jury trial, and allow the trial court at the conclusion of the case, to consider the entry of judgment notwithstanding verdict. This would afford to the appellate court, and all litigants, a meaningful review based upon a complete record. Author and publisher, having moved for directed verdict at the close of the evidence. Fed. Rule CIv. Proc., 50(b), 28 U.S.C., the decision of the trial court, if adverse to the defamed victim, could be reversed on appeal and the jury verdict restored thereby avoiding the expense of repetitive appeals.

Financial attrition through the tactic of repetitive appeals usually works to the advantage of the mass conglomerate communication media, such as respondents in the instant petition. This is more desireable than the granting routinely of summary judgement, Fed. Rule Civ. Proc. 56, 28 U.S.C.. A decision by the Supreme Court Of The United States to this effect will restore a needed balance between the adversaries consistent with the First Fourteenth and Seventh Amendments to the United States Constitution.

It should be noted that the right to the enjoyment of a good reputation is part of the common law incorporated into the Seventh Amendment and is within the constitutional guaranty of personal security. Afro-American Pub. Co. v. Jaffe, (C.A.) 366 F.2d 649, 125 U.S. App.D.C. 70

Rosenblatt v.Baer, 383 U.S. 75,Garrison v. State of La., 379 U.S. 64 are both cases of this court wherein the value to society of preserving the tort of defamation are recognized.

The First Amendment does not establish an absolute exemption from the common law liability for libel and slander.Time ,Inc. v Hill, 385 U.S. 374. As a general rule defamatory utterances are not within the area of constitutionally protected speech and writing. Roth v. U.S.,Cal. & N.Y., 354 U.S. 476. The guaranties of freedom of speech and of the press rank no higher than other rights protected by the constitution. Jones v. City of Opelika, 316 U.S. 584,vacated on other grounds 319 U.S. 103.Freedom of the press is subject to limitations and restrictions.Chaplinsky v. State of New Hampshire, 315 U.S. 568.

4) Where, with litigation pening in California, the defamatory book is the subject of free disguised advertising, wherein petitioner is defamed and personally attacked and the pending litigation is arrogantly referenced on "The Tonight Show," there is a violation of the Federal Communications Act (47 U.S.C. sect.151 et.seq., and rules promulgated thereunder (47 C.F.R. sect.73.123) all from which a jury may infer actual malice.
If this Court has held that there can be no private cause of action arising therefrom, that decision should again be reviewed and reversed or clarified by having certiorari granted.

5) Where the District Court dismisses a complaint alleging a continuing conspiracy in violation of antitrust statute with overt act in furtherance thereof within the limitation period and leave to amend is pending and is ignored andaffirmed by the Circuit Court contrary to the decisions of the court and federal rules of civil procedure, certiorari should be granted.

If the complaint filed by petitioner Brownlow

required more specificity leave to amend should have been granted by the trial court or by the Circuit Court. Pleadings should be liberally construed. Beacon Theaters Inc. v. Westover, 359 U.S. 500 The function of notice pleading is to allow the facts-- characteristically concealed in a conspiracy-- to be revealed during pre trial discovery. Hickman v. Taylor, 329 U.S. 495. Compare Fed. Rules Civ. Proc, Rules, 8, 9, 12, 15, 15(a), 28 U.S.C.

Neither a copyright license, a legal monopoly, nor a Federal Communications Commission license to broadcast, should allow a communications conglomerate owning print and broadcast media, to immunize itself under the First Amendment. (15 U.S.C. 1, 2, 12, 13(a)(e), 15, 15(b), 18, and 22. See also 47 U.S.C. 312, 313, 315, 317 and 47 CFR 73.123(a) Red Lion Broadcasting Co v FCC, 395 U.S.367, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-254, First National Bank of Boston v. Bellotti, 435 U.S. 765 where this court noted

with concern the ability of a media conglomerate to manipulate and shape public opinion.

6) The granting of summary judgement based upon an absolute privilege for journalist's observations, opinions and conclusions, wherein petitioner was depicted in print and broadcast journalism as "paranoid", "oily criminal bastard", "psychotic", "insane", "difficulty distinguishing reality from delusion", and the analogy between the fictional "Captain Queeg" of Herman Wouk's "The Caine Mutiny" and the real life Captain Armbeiter as both being mad, with absolute immunity given the journalist-author by reason of his claiming that he merely quotes third parties, constitutes an important area for this Court's consideration in constitutional defamation., particularly since the defamation here was conducted in two book publications spaced a year apart, with a television broadcast in between.

Respondent author,publisher and broadcaster defend by claiming that defamatory statements of opinion are not actionable,but are the repetition of words spoken by other persons. These are dishonest opinions and actionable and this court should clearly decide that there are no absolute privileges for repeating vituperative statements known to be false. Hyperbole knowingly false and as in the instant case,not clearly delineated as such, and written in the style of"new journalism"as a fictional novel,is actionable.A dishonest opinion is actionable,Garrison v.Louisiana, 379 U.S. 64,New York Times Co.v. Sullivan, 376 U.S. 254,292 n. 30:

> "... it follows that a defense of fair comment must be afforded for

> honest expression of opinion based upon privileged,as well as true statements of fact. Both defenses are of course defeasible if the public official proves actual malice ...".

The conclusion that the defamatory statements are mere hyperbole or merely vigorous epithet, and is therefore absolutely privileged, is not the law. Dictum used by this court, has created confusion, and should be clarified in the instant case.It is only mere dictum in Gertz v. Robert Welch Inc.,418 U.S. 323,339-340;

> "...Under the first Amendment there is no such thing as a false idea.However pernicious an opinion may seem,we depend for its correction not on the conscience of judges and juries but on the competition of other ideas...".

If this dictum were the law it could not be operable except for an incumbent public official enjoying a built in platform for debate, or for those few

whose private resources would enable them to mount a sufficiently major and effective public relations campaign as to overcome, if not meet, the defamatory attack. Calculated falsehoods enjoy no immunity under the Constitution, Time Inc. v. Hill, 385 U.S. 374,390. In Ragano v. Time , Inc.(C.A.-5,1970) 427 F.2d 219 it was held that the First Amendment applies to publisher whether he writes fact or opinion; some notice must be given to the reader when opinion is substituted for facts, and not to do so thus allowing the reader opportunity to weigh all facts is actual malice for a jury. trial.The lower courts have decided the instant case contrary to the decisions of this court, the Fifth Circuit and even its own decision. Goldwater v. Ginzburg, 414 F.2d 324,cert. den. 397 U.S. 978.Certiorari should be granted to settle the law as to opinion being actionable.

The record below fails to contain a complete copy of both the psychiatric and psychological diagnosis of Tom Generous although repeatedly requested in the trial court and appellate court. During discovery respondents made this record fleetingly and inadequately available unilaterally asserting only petitioner's attorney would read the record and that no notes be taken and no copy given. (A.272a,273a,274a,275a).This same record was given to Sheehan by Generous in preparation of the book,after requests from the attorney for the publisher. The production of this complete record is needed to enable the court to compare to portions of the print and broadcast publications to determine actual malice.

Tom Generous was the operations officer when petitioner was in command of the U.S.S. Vance and respondents conceal a possible explanation for crew

morale loss could have been the over-reaction of Tom Generous, as a borderline schizophrenic questionably fit for sea duty, as diagnosed by Navy Psychologist, which over-reaction spread to some of the other officers and crew, caught up in an unpopular war. Compare television broadcast; (S.A. 519a-536a, 535a, 536a)

> "...Carson: I asked you during the commercial break which would seem to be a logical question....Did he undergo any kind of psychiatric examination? (TV tr., p.14)
> ... Carson: I want to try to just ask you one question we might have time for when we come back, if you've looked into his background at all that might lead you to believe what caused this behavior. We'll be right back ... Station Break
> End of Interview
> .... (TV Tr. p.18)

Compare Book pp.292-294

> "...He(Captain Alexander) was equally certain. He said Generous was psychotic.... he cited Generous' medical record as evidence. I had also seen Generous' medical record and it was evidence to the contrary....

On the Vance, Arnheiter said, Generous had manifested a psychotic urge to undermine all established authority... ...(p.293) I asked to see his medical record....The record corroborated his story. ...(p.294) Now I asked Alexander(Arnheiter's most prestigous supporter) why he was certain that Generous was psychotic. He had seen Generous' medical record, he said, and had also asked a senior Navy psychiatrist whom he knew to read it. The psychiatrist had told him that Generous was a 'dangerous' person..." (emphasis and parenthetical inserts supplied)

Reference is here made to a close comparison between the above defamatory publications concerning petitioner and the conclusion reached by Captain Witter in his file memo, where, referring to petitioner, he states ".. not that he is crazy or anything like that at all..." (A.719a-727a, R.-63,72 Civ.7601,78-7539 exhibit-14 annexed. and compare also exhibits 15,16 and 17, Dr. Forkosh, Navy psychiatric affirmative evaluation of petitioner and

also psychiatric evaluation of petitioner since litigation, exhibits 18 and 19 annexed to R-63). Petitioner has never been diagnosed insane,and to be so depicted by respondents and to have done so is an allegation 'inherently improbable' and False within the decision of St Amant v. Thompson, 390 U.S. 727 (1968). Certiorari should be granted So that the lower courts comply with the decisions of this court.

Respondents promotion of the Sheehan book as the factual to the fictional novel entitled "The Caine Mutiny" by Herman Wouk,published by Doubleday & Company ,Inc, in 1951 was motivated by a desire to duplicate the huge commercial success on television, motion pictures and legitmate theater of the classic of the second world war.

It was necessary,therefore,to create an analogy between "Queeg" and petitioner. To do So petitioner had to be depicted as a real life paranoid captain.Thus respondents distorted the truth that petitioner had never been diagnosed as insane while on active duty, or since. Sheehan and respondent publisher knew or ought to have known about Dr. Forkosh's affirmative psychiatric evaluation of petitioner whom he observed while both were on active duty.

To maintain this contrived analogy between "Queeg" and Arnheiter,a trial had to be avoided at all costs. To this end Sheehan manipulated and managed the developing events so as to maliciously obstruct petitioner's remedy.Evidence surfaces of a jury issue of actual malice since the First Amendment should afford no privilege to the reporter who becomes himself a tortious participant. Zurcher v. Stanford Daily, 436 U.S. 547 (1978)

Compare letter from petitioner to President of the United States dated January 6,1970 And the letter from petitioner to Henry Kissinger, and the letter from petitioner to Clark Mollenhoff Special Counsel to President and answering letter dated January 13, 1970.Also petitioner's next letter dated January 28, 1970 to Mr. Mollenhoff.And finally,Sheehan's obstruction of petitioner's remedy wherein he defames and discredits him in a conference with Mr. Mollenhoff.(A 719a-727a,R.-63,72 Civ. 7601,78-7539 exhibits 8, 9, 10, 11,12 and 13, also set forth in A.789a-820a)

When respondents state that the Navy could not try petitioner ,being trapped in their own procedures and because to punish presumes mental competency

they conceal from the viewer and reader the participating role played by the author in obstructing the last procedural step in the remedy sought, *i.e.*, to have a courts martial or court of inquiry convened by the President of the United States.Article II,Section 2, Clause 1, of The Constitution of the United States of America. As the Commander in Chief, the President is the last possible convening authority to whom petitioner could resort.10 U.S.C.932,833,933 .Again it is noted during petitioner's entire active duty service his mental competency was never questioned in accordance with military law.Not even Captain Witter, who had a duty to do so,if there was in his mind a real belief that Arnheiter was afflicted by a mental or personality disorder,ever invoked available remedies.

Respondents' explanations conceal the truth, that petitioner may have been the victim of a mutiny, inspired by an operations officer who was known to be questionably fit for sea duty. This, a courts martial or court of inquiry would have revealed. This, an inference arises, the U.S. Navy, in an unpopular war, with wide spread public apathy among civilians and insubordination among service personnel, desired to conceal. Respondents, motivated by a promotion of a book sequel to The Caine Mutiny, required that the captain be paranoid and to do this, Sheehan actively involved himself in obstructing the final remedy. Compare Uniform Code of Military Justice, 10 U.S.C. 822, 10 U.S.C. § 32 Investigations, Humphrey v. Smith, 336 U.S. 695 First Amendment provides no immunity from tortious injury to another's business or remedy. West Willow Realty Corp. v. Taylor

198 N.Y.S.2d 196 app. dism. 205 N.Y.S.2d 810, McCloskey v. Kidder Peabody & Co., 212 N.Y.S.2d 828

Respondents obstructed petitioner's final remedy in seeking to have the President of the United States, as Commander-In-Chief, convene a courts martial or court of inquiry relating to his summary removal from command of a war ship and subsequent related events. Sheehan defamed and discredited petitioner in a conference with special counsel for the President, who was at that time reviewing the file. Sheehan's conduct is concealed in both the print and broadcast journalism. On the television broadcast to an estimated seventeen million viewers, Sheehan and Carson arrogantly depict the pending litigation as "specious" and refer to petitioner's gainful employment in a manner that resulted in its loss.

7) Each separate republication of a defamation is, itself, an independently actionable tort, and the United States Court of Appeals for the Second Circuit, in affirming District Court summary judgement rendered on trial date, after District Court had previously denied summary judgement three times, including once on this same issue of res judicata and collateral estoppel, relied upon by the appellate court, and based upon Ninth Circuit Court of Appeals affirmance of District Court summary judgement on first hard cover book publication, have thereby ignored genuine material fact issues for the jury in the record, subsequent thereto, including litigation commenced and pending before defamatory republication by broadcast journalism, which included a personal attack and arrogant reference to said litigation with adverse prediction of this court's

decision over television broadcast to about seventeen million viewers, using facilities owned by corporate parent of wholly owned subsidiary book publisher, while promoting book sales, which broadcast resulted in the second litigation and the third litigation after the paper back book republication without any subsequent investigation or textual correction by author or publisher, has thereby rendered a decision on important questions of federal law which have not been, but should be settled by this court.

The paperback book was republished by respondent Dell Publishing Co. Inc., on February 1, 1973 pursuant to an agreement with Random House,Inc dated May 5, 1972.(S.A. 591a-595a). At that time litigation was pending in California and the first New York complaint had been filed (78-7539). Respondents , Neil Sheehan, National Broadcasting Company, Inc. and Random House, Inc., had actual knowledge on February 1, 1973 of the following; (1)Complaint filed in Arnheiter action in Northern District of California,(S.A. 125a) and the Amended Complaint(S.A. 132a-146a which had been served and filed as of September 18, 1972. The Amended Complaint communicates actual knowledge of numerous false and defamatory statements in the book. To deny respondents' knowledge is to ignore reality and granting summary judgement

was to construe the record most favorably to the moving party and to consider all pleadings and documents filed in opposition by petitioner to be totally lacking in credibility. This court should grant certiorari, because the lower courts having reversed the applicable rule of federal civil procedure in constitutional defamation cases.

(2) Complaint filed in Southern District of New York on June 20, 1972 (A.445a, 448a-454a)and the Amended Complaint served and filed on November 20, 1972, (A.458a;471a-479a).

(3) The record of pleadings filed with the Clerk of both the United States District Court for the Northern District of California and the Southern District of New York reveal proceedings which provided further knowledge to respondents'

prior to February 1, 1973. In 72 Civ. 2601 (78-7539 2d Cir.) (A.445a-446a) and includes in New York, request for production, interrogatories propounded by petitioner. While respondents did not answer these interrogatories until subsequent to the republication of the paperback book, and when they answered were not very responsive, an examination of the questions is evidential of communication of knowledge of falsity and reckless disregard for truth.(Compare A.532a, as to Random House,Inc.,which had been served by mail upon Joseph Kraft Esq. on or about July 17, 1972,A 532a-554a,as to National broadcasting Company,Inc., 555a-574a, as to Sheehan,575a-594a,which are a classic example of evasiveness as are Sheehan's deposition transcripts(78-7539 R.50,51,52,64 and 65).

(4) The record of pleadings filed with the Clerk of the Northern District of California,was subject to judicial notice by Judge Cannella (S.A. 1a-115a particularly S.A. 86a-87a,)of the Southern District of New York.While that record will be filed with this court, as previously indicated,in a separate petition for writ of certiorari to be filed after Judge Williams rules on pending motion to vacate judgment, portions thereof are set forth in the record below.(S.A. 191a- 211a,)

On April 11, 1972,the date of the broadcast journalism republication of the defamation the following was within the knowledge of these respondents; Random House,Inc., and Neil Sheehan,
(1) the filing and service of the complaint in the California case (S.A. 125a-131a),
(2) this was acknowledged when specific reference thereto as "specious" was made by respondents Neil Sheehan and Johnny Carson on "The Tonight Show" broadcast to an estimated seventeen million viewers over respondent National Broadcasting Company, Inc. television network facilities.(Amended Complaint, No.78-7539,R.-19,S.A. 519a-520a,534a)
(3)correspondence from petitioner to respondents Random House,Inc.,and RCA Corporation,(S.A.577a- 584a), threatening to sue for libel on book

(4) correspondence between petitioner and W.W.Norton & Co., initial publisher who refused to publish book (S.A. 282a-283a).Respondents had actual knowledge of this correspondence and former publisher's reasons for rejecting the book after investing editorial time and money on it,(S.A. 286a-288a, Deposition Transcript Robert Loomis, editior for Random House, Inc.,August 13, 1976,R-60,pp.215,216,219 A.673a-674a, A.351a -412a,particularly, 362a-367a excerpts of depositions of editors of W.W.Norton & Co.,368a,369a,370a-373a agreement to publish book,386a agreement not to publish book,392a,287a-291a affidavit on behalf of W.W.Norton & Co. Inc..See also deposition transcripts as to W.W.Norton & Co.Inc.;78-7539, R-55,56,57,58,and Random House,Inc., R-59 and 60),

(5)Joseph Kraft an attorney and officer of respondent Random House, Inc. in his affidavit, (S.A. 585a-587a,par.5) admits knowledge of pending litigation and prior correspondence between petitioner and respondents RCA Corporation Random House,Inc. and Neil Sheehan. Although responsible for reviewing legality of broadcast,during live audience taping, Mr. Kraft,in violation of personal attack rule,allowed,without editing the broadcast wherein petitioner is depicted as "... paranoid..."(S.A.523a) by respondent Johnny Carson who thereafter uses as a synonym the word "... strange ..." (S.A. 523a,) Respondent Sheehan refers to the pending litigation as "... specious..." (S.A. 519a-520a,534a) in two separate references during the broadcast to the litigation.Construed most favorably to petitioner, a jury

issue as to actual malice,

(6) The existence of petitioner's Donald G. Brownlow's book and the results of his own investigation. Compare Brownlow affidavit(A.872a-882a) uncontradicted by respondents.Brownlow's statement in paragraphs 6 and 7 of his affidavit,raise a jury issue as to respondents' knowledge of another book its underlying investigation and its supression and denial of media access in both print and broadcast journalism by respondents, at a time prior to the television broadcast on April 11, 1972.

> "... 6. Shortly after Sheehan's book had been published,in 1972, Sheehan telephoned me. The impact of the phone call was to discourage me from publishing my book manuscript.However,I was not intimidated and attempted to have my book published....
>
> 7.Although my investigation and book were well known to Neil Sheehan and Random House,Inc., ... I was denied access to both print and broadcast journalism to the date of this affidavit." (dated June 2, 1978)

(7) Correspondence from attorney for Captain Alexander to Joseph M. Kraft,Esq. Staff Vice President of Random House,Inc. dated January 12, 1972 with enclosures, which complained of factual inaccuracies relating to petitioner receiving command of a war ship.(A.822a-831a) Alexander's affidavit dated June 3, 1978 was never contradicted by respondents ,yet did not result in correction of print republication by respondent Dell Publishing Co. Inc., in February 1973.Compare affidavit of Carl W. Tobey on behalf of respondent.Dell Publishing Co.Inc., (S.A. 591a-592a),and affidavits of Richard A. Kelly (S.A. 596a-597a) and Herminio Traviesas (S.A. 598a-599a) on behalf of National Broadcasting Company Inc.,which reveal arrogant indifference to Communications Act and adminstrative regulations enacted pursuant thereto.

The lower trial and appellate courts in the instant petition found no evidence subsequent to the publication of the hardcover book in February 1972 that would create a jury issue as to actual malice. The record, however, reveals that the respondents knew of the pending litigation in California on April 11, 1972, when it was arrogantly referenced as "specious".

This same reckless disregard for truth and knowledge of falsity is manifested by respondents republication of the paperback book in February 1973.This was at a time when litigation was pending in California, on the hardcover book and on the television republication, in New York. An examination of the dockets of pleadings filed with the clerk of the United States District Court for the Northern District of California and the Southern District

of New York reveals evidence of state of mind for the jury which the lower courts have ignored applying a "rule" to grant summary judgement in constitutional defamation cases, rather than the exception.

This court should grant certiorari to settle the law as to the evidential significance of pending litation at the time of defamatory republication. Compare; Church of Scientology of Cal. v. Dell Publishing Co. Inc. (M.D. Cal.,1973) 362 F. Supp. 767, Schermerhorn v. Rosenberg, 47 A.D. 2d 669,364 N.Y.S. 2d 210(2d Dept,1975),Dickey v. CBS Inc, 583 F.2d 1228 (3rd Cir. 1978)

The Second Circuit and its District Courts, have created a "rule" of granting summary judgments in constitutional cases, rather th n as an exception. In the same manner as this court

repudiated their creation of an "editorial process privilege" in Herbert v.Lando ___ U.S. ___ (1979),it should grant certiorari in the instant petition to repudiate a "rule" which converts a qualified privilege into an absolute privilege.

The record must be construed most favorably to the petitioner having been decided on respondents' motion for summary judgment. Bishop v Wood,426 U.S. 341,347 n.11 (1976);United States v. Diebold Inc., 369 U.S. 654,655 (1962) See also this court's decision in Hutchinson v.Proxmire,___ U.S.___ (1979)n.9 on p. 8 of slip opinion;

> "Considering the nuances of of the issues raised here,we are constrained to express some doubt about the so-called "rule".The proof of "actual malice" calls a defendant's state of mind into question,New York Times v. Sullivan, 376 U.S. 254 (1964) and does not readily lend itself to summary disposition. ..."(emphasis supplied)

The lower courts ignore the evidential significance of occurences prior to the publication of the hard-cover book in February 1972.A reading of the decision of the District Court and Ninth Circuit holds merely that the weight of the proofs as revealed by affidavits, depositions and answers to interrogatories failed to show clearly and convincingly that a jury issue of actual malice existed, up to the time of first publication. Assuming per arguendo the correctness of this decision, the occurences coupled with evidence of subsequent happenings, cumulatively provided a jury issue of genuine material fact particularly when giving to petitioner the benefit of all inferences and resolving all doubt against the granting of summary judgment.

Surely litigation pending that is ignored or arrogantly dismissed as "specious" during a broadcast journalism Personal attack on petitioner, shows a reckless disregard for truth, knowledge of falsity and indifference to the Communications Act,47 U.S.C. sect. 151 et. seq., and applicable regulations of the Federal Communications Commission including the Personal Attack Rule (47 C.F.R. sect. 73.123).Respondents characterizing pending litigation as "specious" on April 11, 1972 anticipated the decision of this court,which hopefully will be made after the granting of certiorari. This is arrogance of a mass monopolisitic communication media conglomerate,respondent,RCA Corporation and its wholly owned subsidiary respondents' National Broadcasting Company, Inc. and Random House,Inc.

The case sub jucice reveals the manner in which respondent RCA Corporation tarough its ownership of print and broadcast journalism,and its dominant position in the promotion and commercial exploitation of books and their literary property rights,including motion picture and television adaptation, has managed to stifle a robust debate dialogue and replace it with a manipulated monologue. The Sheehan television interview was such a manipulated monologue.Neither was petitioner Donald G. Brownlow afforded access to broadcast journalism as a spokesman for a view contra to that of Sheehan but Brownlow's book was also suppressed. The promotion of "The Arnheiter Affair" as the factual sequel to the fictional "The Caine Mutiny" by Herman Wouk provided the motive since all respondents conspired

to violate the federal antitrust laws so as to share in the joint promotion of both books,in which they all had a direct or indirect interest in the copyrights or subsidiary licenses arising therefrom.

This court has previously voiced concern over the distinction between print and broadcast journalism and the duty to provide media access. Concern by this court has also been noted for the tremendous power of mass communication media conglomerates. Certiorari should be granted so as to clarify these important questions of federal law and the First Amendment. Compare; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241,248-254 (1974) particularly at p.250 where this court noted the danger of manipulating public opinion arising with the growth of modern

media empires.

Certiorari should be granted to allow this court to reconsider whether a violation of the personal attack rule and the Federal Communications Act, provides for an independent private cause of action or at least is evidential on the issue of actual malice. It is respectfully submitted that the case of Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1942) should be overruled or clarified so that a jury may consider an inference of actual malice from a violation of the personal attack rule. Other federal administrative agencies and the public continue to benefit from the availability of a private cause of action in enforcing violations of their laws and regulations, as for example in securities law. Absent a private remedy, the Federal Communications

Commission has demonstrated an almost total subservience to the owners of network broadcast journalism facilities coupled with a resulting arrogant indifference by the license holder to compliance with rules such as require clear disclosure of economic interest and avoidance of personal attack without media access for rebuttal. A jury issue exists as to actual malice when pending litigation is described as "specious" in a television interview on April 11, 1972 in which the viewer is not told that a book published by a wholly owned subsidiary of RCA Corporation is being promoted free of charge by another wholly owned subsidiary, National Broadcasting Company, Inc., without disclosing intra corporate economic interests in the book or the pending case.

Conclusion

By reason of all of the aforesaid it is respectfully submitted that the within petition for a writ of certiorari be granted,

Leon S. Wolk

Counsel for Petitioners
31 Wildwood Road
Woodcliff Lake, N.J.
(201) 391-9887

Opinion of Judge John M.Cannella in Arnheiter v. Sheehan et. als. 72 Civ. 2601 -78-7539,D.C.S.D.N.Y.,and Arnheiter v. Dell etc. et. als. 73 Civ. 2742- 78-7538,dated September 11,12, 1973 (S.A. 4a-5a)

THE CLERK: For trial,Marcus A. Arnheiter v. Neil Sheehan and others. Plaintiff ready?

MR.WOLK: Plaintiff is ready.

THE CLERK: Defendant ready?

MR. ELDRIDGE: The defendants are not ready,sir.

THE COURT: I am not going to go into that at this time.I am aware that you are not ready.However,I find myself in this posture at this time.I am aware of the various points that have been raised by the summary judgement motion. I am not persuaded,if I were deciding the case alone,that the plaintiff has

anywhere near reached the required standard of proof,which is a very onerous standard of proof in this type of a case,because of Times v. Sullivan decisions and other decisions of which the Court is aware.

Under the circumstances what I am going to do at this time is direct the plaintiff to make an opening,just as he would to the jury in this case at this point,and then I am going to think about this case overnight,and I will meet you tomorrow morning and then go into your situation,the defendants' situation,if it becomes necessary at that time....(S.A. 58a-59a)

THE COURT:The posture of the case, as I indicated earlier,was that I have a motion for summary judgement which was under consideration,and I think it was Tuesday night or Wednesday

I advised the parties through my law clerk,proably Wednesday,that I was going to deny the motion for summary judgement and that I intended to proceed to trial.I was aware that there was a reluctance on the part of the defendant to proceed at the time because of certain applications they wanted to make,but in any event I instructed my clerk to indicate that as far as I was concerned I would start the case on Monday.

At this juncture,in thinking over the case, I decided that I would like to hear from the plaintiff where the areas were that it was claimed that the malice was spelled out,and the method I adopted in order to do tnat was to indicate that I adopted in order to do was to indicate that we would have the plaintiff open with the same full force and effect as if the jury was actually present,and

that this was an opening to the jury indicating the proof that would be available,so that they could form a judgement as to whether or not there was malice.

Of course,the critical period that we are talking about is the period between the time the hard-cover book was issued and the time that the soft-cover book was issued....(emphasis supplied)...

MR.ELDRIDGE:...(S.A. 73a) Again I would suggest to the Court,if it would be helpful in any way, the videotape recording I can make available... I know that would normally not be before the Court in terms of an opening statement,but counsel mentions this and I would prefer that in the hopes that, consistent with First Amendment privileges,the cases like this would

be disposed in advance of trial.As courts have said,particularly in this District,the rule in the First Amendment cases is normally summary judgement.It is not the exception to the rule. (neither the federal rules of civil procedure nor the decisions of this court have ever so held,certiorari should be granted to clarify this lower court confusion ,parenthetical insert supplied)... (S.A. 87a-92a)

THE COURT: The Court has had this case for some time and it originally had a motion for summary judgement which the Court denied some time ago.

As the time went on and I fixed the date for trial,a little while before that was done another motion for summary judgement was made and it was

made at a time when I had practically made up my mind that the case was going to be tried on a certain date, and my attitude was in essence, it probably would be easier to try the case than to go wading through another motion for summary judgement.

Particularly, as I reflected on both cases, particularly in the second motion for summary judgement, I was very much reminded of two railroad trains on tracks running parallel with each other and never meeting. I never got to infinity and found out what it was about, to some degree, and under the circumstances I felt, well, maybe what I should do is get along with the trial.

Although I am well familiar with the proposition that in many cases in summary judgement cases it is preferable that there be a plenary trial, even though

in this district very few motions for summary judgement are sustained in the Court of Appeals, and there is a sort of a feeling that motions for summary judgement should not be granted because there is going to be a question of fact lurking in there some place, plus, I am familiar also with the Court of Appeals sense in this particular area that we should grant more motions for summary judgment where we, in our mind, feel in good conscience they should be granted.

So there are countervailing situations, countervailing feelings on this question of whether you grant the motion for summary judgment. (emphasis supplied)

Yesterday, the Court, being disturbed by having to go through a full trial at great expense to both sides, and then the Court having to rule at the end of it that there wasn't sufficient proof

to go to the jury,and the expense that would be entailed in such a situation, was disturbed and thought that there might be judicial saving if I could find out in what would be an opening to the jury, whether the plaintiff had succeeded and what the Court thought might happen,namely, that they would be able to show that there was actual malice brought home to these parties.

So the Court yesterday invited counsel for the plaintiff to present the opening that he would make to the jury. And as I indicated in my earlier remarks this morning,that was not really an opening,as he well knew ,and I well knew,and the defendants' lawyer knew, and I think that there was a law school student just starting his studies that recognized that it was not really an opening,but,in any event,I didn't see

any harm in it because it presented argument,summation,and everything all rolled up into one-- but I was hoping in amongst the dross I would find some gold,and unfortunately I didn't find any gold.

So that upon a reconsideration of the papers submitted on the last motion for summary judgment in addition to the comments which were made in the nature of an opening by plaintiff's attorney, the Court concludes that the plaintiff cannot come forward with clear and convincing proof that a defamatory falsehood was made by any defendant with knowledge of its falsity or with reckless disregard for the truth.

It must be remembered that the alleged libel contained in the hard cover book has been found constitutionally

protected by the United States District Court for the Northern District of California.

It is true that certiorari is being sought or may be sought, or will be sought, but I can't wait and hold my breath to determine what the result of that is going to be.

In the 9th Circuit they have already ruled on this and they have gotten to the stage where they have denied plaintiff any remedy in the Appellate Court,

In denying the motion for summary judgment in this case, the Court afforded the plaintiff the opportunity to come foward with proof that subsequent -- and I understand that 'subsequent'-- to the publication of the hard cover book in February of 1972, some of the defendants obtained knowledge that the statements in the book , the Arnheiter Affair, are false. In such a case the republication

of the statement on the Johnny Carson television show in April 1972, and the paperback book in 1973, might have been actionable, but the plaintiff has failed to show to this Court's satisfaction that any of the defendants obtained such knowledge during this period.

Both in the "opening" yesterday and in the papers submitted in opposition to the defendants' motion for summary judgment, it is demonstrated to the Court that the plaintiff cannot, and could not come foward with this proof at the trial. Indeed, several defendants were not mentioned at all in this so-called opening.

Accordingly, the Court finds that there is no genuine issue as to any material facts, and that the defendants are entitled to judgment on the law because the plaintiff, in this Court's

opinion, cannot meet the onerous burden of proof which is required in such a case by the dictates of the Supreme Court case Sullivan v. Time .

As to the application for additional discovery, it is denied. These cases are over six years old.

Moreover,the purpose of a lawsuit is to redress a wrong not to find one. (emphasis supplied)

These are the Court's findings of fact and conclusions of law.

Both actions are dismissed on the law as to all defendants

This is so ordered.Submit a judgment. ... (S.A.115a)

THE COURT: I have not been persuaded that I should change what I have indicated in my earlier remarks and therefore I abide by what I said before....

A-12

Arnheiter v Sheehan et. als. 72 Civ. 2601

Arnheiter v. Dell etc. et. als. 72 Civ. 2742

Memorandum Decision March 16,1978

CANNELLA, D.J.: (A.347a-350a)

Motion by defendants Neil Sheehan, Random House,Inc.("Random House"),National Broadcasting Company.Inc.("NBC") and Dell Publishing Co.,Inc. ("Dell") to interpose the defense of res judicata and collateral estoppel, Fed. R. Civ. P. 15,is denied.

Motion by these defendants for summary judgement,Fed. R. Civ.P.56,is denied.

These actions arise out of NBC's April 11, 1972 broadcast of an interview with Neil Sheehan on the "Tonite Show" concerning the book he wrote entitled The Arnheiter Affair (72 Civ. 2601(JMC)). and Dell's 1973 paperback publication of this book (73 Civ. 2742 (JMC)). A third action which was dismissed on motion

- A(i),13 -

for summary judgment,concerning the initial publication of the book in hard-cover form by Random House.Arnheiter v. The New York Times,No. C-72-342 S.W. Civil(N.D. Cal.,Nov.7,1975).In each of the three actions plaintiff has sought money damages for defamation.

In granting the motion of defendants Random House and Sheehan for summary judgment, the California district court stated:

> It further appear(s) to the Court that the writing and publication by defendants Neil Sheehan and Random House,Inc., respectively,of the book entitled The Arnheiter Affair are subject to the protection of the First and Fourteenth Amendments of the Constitution of the United States(New York Times v. Sullivan, (1964) 376 U.S. 254); that plaintiff has not met and could not,with further discovery,meet the burden placed upon him thereunder of coming foward with any fact which proves that said book or any portion thereof claimed by plaintiff to be false and defamatory was written and published by defendants or either of them with knowledge of the falsity or reckless disregard for the truth thereof;that there is, therefore, no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law . . . . id.,slip op. at 2. Moving defendants herein claim that based upon the decision of the California federal court, the doctrines of res judicata and collateral estoppel bar plaintiff from prosecuting the actions before this Court. The Court disagrees.

There exists neither an identity of claims nor of issues between the dismissed action and the two cases presently pending before this Court. See Herendeen v. Champion Int'l Corp., 525 F.2d 130,133-34 (2d Cir.1975).and authorities cited therein. The California district court found that plaintiff could not prove that either Sheehan or Random House published the allegedly defamatory matter in the hard-cover version of The Arnheiter Affair "with

knowledge of the falsity or reckless disregard for the truth thereof ..." That court did not determine, and could not have determined, the states of mind of these parties, or the other moving defendants, at the time of the two subsequent publications involved in the actions before this Court.

Assuming arguendo, the falsity of the allegedly defamatory statements, plaintiff may be able to prove that, by the dates of the subsequent publications, defendants had or should have become aware of their falsity. Certainly, filing of the California action on February 25, 1972 put defendants Random House and Sheehan (who were named as defendants also in the California suit) on notice of a possible libel and should notice their inquiry into the subject matter of the book. The other moving defendants,

because of their interest in the literary property in question, may very well have learned of the California action prior to the subsequent publications and similarly may have probed the truthfulness of the allegedly defamatory matter.

At this juncture the Court takes no position on plaintiff's likelihood of meeting the heavy burden before it but holds merely that his claims are not frivolous and are not barred by virtue of the California district court's decision.

SO ORDERED

/s/ John M. Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
March 16, 1978

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the eighteenth day of May one thousand nine hundred and seventy nine

Present: Hon. William H. Mulligan
Hon. Milton Pollack *
Hon. Robert L. Carter*
Circuit Judges

Marcus A. Arnheiter,

Plaintiff Appellant,

against

Dell Publishing Co. Inc. et. als.

Defendants Appellees,

78-7538

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District Court be and is hereby affirmed. Relying on principles of res judicata and collateral estoppel, we note that the Ninth Circuit has already judged the hardcover version of "The Arnheiter Affair " under the standard of actual malice enunciated in New York Times Co. v Sullivan, 376 U.S. 254 (1964), and concluded that neither the author Neil Sheehan nor Random House, Inc. published the hardcover with knowledge of its falsity or with reckless disregard for the truth. Arnheiter v. Random House, Inc., 578 F. 2d 804 (1978). Appellant has failed to come foward with proof that, subsequent to the publication of the hardcover version

of the book, any of the appellees obtained knowledge that any statement in the book is false. Therefore, appellant has not met his burden under New York Times Co. v. Sullivan , supra, of providing clear and convincing proof that the paperback edition of the book was published with actual malice. ...

Marcus A. Arnheiter,

Plaintiff Appellant,

against

Neil Sheehan et. als.

Defendants Appellees,

780 7539

...

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and is hereby affirmed.Relying on principles of res judicata and collateral

estoppel, we note that the Ninth Circuit has already judged the hardcover version of "The Arnheiter Affair " under the standard of actual malice enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) , and concluded that neither the author Neil Sheehan nor Random House Inc. published the hardcover with knowledge of its falsity or with reckless disregard for the truth. Arnheiter v. Random House, Inc., 578 F2d 804(1978). Appellant has failed to come foward with proof that,subsequent to the publication of the hardcover version of the book,any of the appellees obtained knowledge that any statement in the book is false.Therefore , appellant has not met his burden under New York Times Co. v. Sullivan, supra, of providing clear and convincing proof that the April 11, 1972 interview of Neil Sheehan on "The Tonight Show" was broadcast with actual malice. ...

Brownlow v. RCA etc. et. als. May 18,1979

Opinion of Judge John M. Cannella
in Brownlow v.RCA Corporation et. als.
78 Civ. 2668 -(JMC) dated November 6,1978

CANNELLA,D.J.:

Defendants' motion to dismiss the complaint is granted,Fed.R. Civ. P. 12(b) (6)

THE COMPLAINT

Reading the complaint in the light most favorable to the plaintiff,the Court finds that it alleges the following:

1.Sometime in 1971,defendant Sheehan completed "The Arnheiter Affair", an account of Marcus Arnheiter's command of the U.S.S.Vance, a command from which the Navy abruptly relieved Arnheiter after 99 days.

2. From 1971 through 1973,defendants Dell Publishing Co.,Inc. Doubleday & Co. Inc.,Random House, Inc, and RCA Corporat("the publishing defendants") published "The Arnheiter Affair", promoting it as

a factual analog of Herman Wouk's classic," The Caine Mutiny," publication rights of which are licensed to Dell and Doubleday.

3.In April 1972,defendants Johnny Carson,Raritan Enterprises,Inc. and National Broadcasting Co.,Inc.("the broadcasting defendants") produced and broadcasted a segment of "The Tonight Show" during which Sheehan appeared as a guest and discussed in considerable detail "The Arnheiter Affair". Neither Sheehan nor any of the publishing defendants paid a fee for Sheehan's appearance to any of the broadcasting defendants.

4.Each of the defendants was to share in some way in the profits of "The Arnheiter Affair"

5. In 1973, plaintiff completed "The Albatross,"an account of the same events which, in many material aspects,

differs from Sheehan's.

6.Sometime in 1973,Sheehan stated that plaintiff would be unable to find a publisher for "The Albatross."

7. None of the defendants have ever agreed to publish or promote "The Albatross."

8. None of the defendants have ever agreed to provide plaintiff free television broadcast time to promote "The Albatross."

DISCUSSION

In its present posture,the Court makes no comment about the truth or likelihood of the plaintiff's allegations. The sole question presented here is whether plaintiff would be entitled to any relief if all of his allegations were proven.

In support of his complaint,the plaintiff advances essentially only one legal theory: that the the defendants'

conduct amounts to a conspiracy to violate the antitrust laws.Even if the Court were to accept this theory,however, the plaintiff's claim would be barred by the four year statute of limitations prescribed by 15 U.S.C. sect. 15b. The complaint,filed in this Court on June 12, 1978,fails to allege a single overt act that occurred after June 12,1974,in furtherance of the alleged conspiracy. "A.'right of action for a civil conspiracy of the last overt act causing injury or damage.'" Peto v.Madison Square Garden Corp., 384 F.2d 682,683 (2d Cir. 1967),cert. denied,390 U.S.989 (1968) (quoting Garelick v Goerlich's, Inc.,323 F.2d 854,855 (6th Cir. 1963)). Furthermore,the Court rejects plaintiff's assertion that the statute of limitations was tolled during the pendency of two actions

brought by the United States, since the Court finds neither of those actions materially related to the instant complaint. See 15 U.S.C. 16(b); Peto, supra. See generally Leh v. General Petroleum Corp., 382 U.S. 54 (1965).

For these reasons, the Clerk of the Court is directed to enter a judgment dismissing the complaint herein as to all defendants for failure to state a claim upon which relief can be granted. Fed.R. Civ.P. 12(b) (6).

SO ORDERED.

/s/ John M. Cannella

JOHN M. CANNELLA

United States District Judge

Dated: New York, N.Y.
November 6,1978

Donald G. Brownlow,

Plaintiff Appellant,

against

RCA Corporation, et.als.

Defendants-Appellees,

79-7002

...

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed. Appellant's claim that defendants conspired to violate the antitrust laws is barred by the four year statute of limitations under 15 U.S.C. sec.15b. The complaint, filed in the district court on June 12, 1978, failed to allege that a single overt act in furtherance of appellees' purported conspiracy occured after June 12, 1974. The allegation in the complaint that, effective

June 1, 1976, appellee Dell Publishing Co. Inc., became a wholly owned subsidiary of appellee Doubleday & Co. in furtherance of the conspiracy does not remove the case from the statute of limitations.Appellant could in no way be injured by a combination between Dell and Doubleday to promote Neil Sheehan's book,"The Arnheiter Affair."

All three aforesaid opinions are each signed by the aforesaid judges of the Circuit Court.These opinions also indicate that Judges Pollack and Carter are by designation sitting since they are United States District Court Judge's for the Southern District of New York.

In The United States District Court
Northern District of California
Before Honorable Spencer Williams,Judge
Marcus A. Arnheiter v. Random House,Inc and Neil Sheehan, No. C 72-342 SW, decided October 31, 1975 ...

THE COURT: Taking everything you say most favorably to the plaintiff,I still don't think that there would be an issue to go to the jury on the question of actual malice.Therefore I'll grant the motion for summary judgment...."

... Order

The motion of defendants RANDOM HOUSE,INC.,and NEIL SHEEHAN for summary judgment and plaintiff's motions to transfer the above-entitled actions to the United States District Court for the Southern District of New York, to compel further discovery and to amend the last remaining count of his first amended complaint by

striking from paragraph 3 thereof all but items 1, 6,7,8,25,26,28,43 and 44, having come on to be heard on the 31st day of October 1975, ...

It further appearing to the Court that the writing and publication by defendants Neil Sheehan and Random House,Inc.,respectively, of the book entitled The Arnheiter Affair are subject to the protection of the First and Fourteenth Amendments to the Constitution of the United States (New York Times Co. v. Sullivan(1964) 376 U.S. 254); that plaintiff has not met and could not,with further discovery, meet the burden placed upon him thereunder of coming foward with any fact which proves that said book or any portion thereof claimed by plaintiff to be false and defamatory was written and published

by defendants or either of them with knowledge of the falsity or reckless disregard for the truth thereof; that there is, therefore, no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law; and good cause appearing therefor:

It is ORDERED:

1. That the motion of defendants Random House, Inc. and Neil Sheehan for summary judgment be and the same is hereby granted and that judgment in the in the above-entitled action be entered accordingly;

2. That all but items 1,25,26,28, 43 and 44 of paragraph 3 of the last remaining ccunt of plaintiff's first amended complaint be and the same is hereby stricken;

3. That plaintiff's motion to compel further discovery be and the same is hereby denied; and

4. That,by reason of the granting of defendants' motion for summary judgment plaintiff's motion to transfer the above-entitled action to the United States District Court for the Southern District of New York has become moot.

Dated: 11-5-75

/s/ Spencer Williams

Judge of the

United States District Court

Arnheiter v. Random House,Inc. and Neil Sheehan No. 76-1753,578 F.2d 804 (9th.Cir. 1978) Before Browning and Anderson, Circuit Judges and D. Williams, District Judge

PER CURIAM:

Neil Sheehan wrote a book,published by Random House. Inc., reporting events which occurred during appellant's 99-day command of a Navy war ship, the Vance,on patrol duty during the Vietnam war. Captain Arnheiter was removed from his command by superior officers when they concluded from irregularities in his conduct that he was not fit for command. Arnheiter's persistent efforts to bring about a reversal of this decision became the subject of much public notice and attention from journalists. The Navy upheld the removal, and no Court of Inquiry was convened,despite appellant's urging.

Sheehan's book concluded that the removal was proper.

(1) The trial court granted summary judgment in favor of the author and publisher on the ground that the allegedly libelous material was protected under the rule of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed 2d 686(1964). In appeal Arnheiter argues: (1) that he is not a public official or public figure within the meaning of New York Times, (2) that summary judgment was improper because there was a genuine jury issue, i.e. whether the material was published with knowledge of its falsity, or with reckless disregard of the truth, and (3) that further discovery should have been permitted.

In Rosenblatt v. Baer, 383 U.S. 75, 85, 86 S.Ct. 669, 675, 15 L.Ed2d 597 (1966) it is said:

> "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who gave, or appear to the public to have substantial responsibility for or control over the conduct of government affairs".

The commanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites "public scrutiny and discussion" (Rosenblatt, ibid. n.13) and fits the description of a public official under New York Times. See Henry v. Collins, 380 U.S. 356, 85 S. Ct. 992, 13 L.Ed2d 892 (1965); Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed2d 125(1964)

After New York Times, the Supreme

Court extended the constitutional privilege to defamatory criticism of "public figures". See Curtis Publishing Co. v. Butz, and Associated Press v. Walker, 388 U,S. 130,162,87 S.Ct.1975,18 L.Ed2d 1094 (1967).Appellant claims he is not a public figure within the meaning of these cases because he did not thrust himself into controversy,[1] but only sought redress for what he contends was wrongful removal. He cites Time,Inc. v.Firestone, 424 U.S. 448,96 S. Ct. 958,47L.Ed2d 154(1976) in which a divorcee prevailed in a libel action against a magazine which had inaccurately reported that the divorce was granted on grounds of adultery and extreme cruelty.It was held that she fell outside the definition of a public figure for two reasons:first, her divorce was not a"public controversy," despite considerable attention in the local press

authorship of the complained of "Arnheiter Affair". Under these circumstances,we hold that Arnheiter qualifies under both the public official and public figure tests and that the book must be judged against the New York Times standard of actual malice.

When the constitutional privilege is established,the allegedly libeled person must come foward with"clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." Gertz v. Welch, 418 U.S. 323, 342, 94 S. Ct.2997,3008,41 L.Ed2d 789(1974). This is for judicial determination.New York Times v. Sullivan supra. " Reckless disregard" has been held to mean"those false statements made with a high degree of awareness of their probable falsity." Garrison v. Louisiana supra. 379 U.S. at 74,85 S. Ct. at 216. Sheehan did not

given to testimony of infidelity; and, second, she had not freely chosen to publicize the details of her married life. In contrast, Arnheiter's removal from command of a war vessel implicated critical issues of public concern, i.e. military decision-making in the conduct of war, and the selection of those entrusted with our national defense. Arnheiter did much more than seek reversal of his removal. He used every conceivable effort to gain public exposure and to make his case a "cause celebre". He successfully courted massive publicity and eventually pressured one congressman to hold a series of ad hoc hearings on the subject of his removal. These hearings inspired Sheehan to join many other journalists who took an unusual interest in the case, ultimately resulting in Sheehan to proceed irresponsibly with his writing effort. He spent more than three years researching the data, reviewing sworn testimony taken at various hearings, and talking with individuals who both supported and criticized Arnheiter's conduct. Appellant's argument that Sheehan recklessly attributed insanity to him misstates the facts.

(2) Arnheiter's final argument is that he was not permitted sufficient discovery. This case was over 3 years old when the summary judgment motion was heard, and a review of the records shows that appellant deposed both appellees and demanded and received Sheehan's research materials. There was no abuse of discretion in not permitting additional discovery.

AFFIRMED.

1. "More commonly, those classed as public figures have thrust themselves to the fore front of particular public controversies

in order to influence the resolution of the issues involved."
Gertz v. Welch, 418 U.S. 323,345,94 S. Ct. 2997,3009,41 L.Ed2d 789 (1974)

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

Amendment (I)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment (VII)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment (XIV)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

§ 822. Art. 22. Who may convene general courts-martial

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary concerned; . . .

§ 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

Aug. 10, 1956, c. 1041, 70A Stat. 48.

§ 935. Art. 135. Courts of inquiry

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary concerned for that purpose, whether or not the persons involved have requested such an inquiry.

(b) A court of inquiry consists of three or more commissioned officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(c) Any person subject to this chapter whose conduct is subject to inquiry shall be designated as a party. Any person subject to this chapter or employed by the Department of Defense who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

Aug. 10, 1956, c. 1041, 70A Stat. 76.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 12. Words defined; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act".

Oct. 15, 1914, ch. 323, 38 Stat. 730, amended Sept. 30, 1976, Pub.L. 94-435, title III, § 305(b), 90 Stat. 1397.

15 § 13

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen

competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services

rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 15b. Limitation of actions

15 § 15

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283.

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

§ 22. District in which to sue corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

§ 73.123 Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (b)(3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (b)(2), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 FR 10415. The categories listed in (b)(3) are the same as those specified in section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

NOTE: Inasmuch as no noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office (Sec. 399(a) Communications Act), the provisions of subparagraph (b)(3) referring to "editorials of the licensee" and paragraph (c) in its entirety do not apply to such stations.

[32 FR 10305, July 13, 1967, as amended at 33 FR 5364, Apr. 4, 1968; 41 FR 17551, Apr. 27, 1976]

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Fed. Rules of Evid., 28 U.S.C.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.

312. Administrative sanctions—Revocation of station license or construction permit

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of Title 18.

Cease and desist orders

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

Order to show cause

(c) Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Burden of proof

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Procedure for issuance of cease and desist order

(e) The provisions of section 1008(b) of Title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order. June 19, 1934, c. 652, Title III, § 312, 48 Stat. 1086; July 16, 1952, c. 879, § 10, 66 Stat. 716; Sept. 13, 1960, Pub.L. 86-752, § 6, 74 Stat. 893.

§ 313. Application of antitrust laws to manufacture, sale and trade in radio apparatus—Revocation of licenses

(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Refusal of licenses and permits

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section. June 19, 1934, c. 652, Title III, § 313, 48 Stat. 1087; Sept. 13, 1960, Pub.L. 86–752, § 5(b), 74 Stat. 893.

§ 314. Competition in commerce; preservation

After the effective date of this chapter no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this chapter, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce. June 19, 1934, c. 652, Title III, § 314, 48 Stat. 1087.

§ 315. Candidates for public office—Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

[*See main volume for text of (1) to (4)*]

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in tthe public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Broadcast media rates

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

Definitions

(c) For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

Rules and regulations

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

As amended Feb. 7, 1972, Pub.L. 92–225, Title I, §§ 103(a) (1), (2) (B), 104(c), 86 Stat. 4, 7; Oct. 15, 1974, Pub.L. 93–443, Title IV, § 402, 88 Stat. 1291.

47 § 317

§ 317. Announcement of payment for broadcast—Disclosure of person furnishing

(a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

Disclosure to station of payments

(b) In any case where a report has been made to a radio station, as required by section 508 of this title, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

Acquiring information from station employees

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Waiver of announcement

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

Rules and regulations

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. June 19, 1934, c. 652, Title III, § 317, 48 Stat. 1089; Sept. 13, 1960, Pub.L. 86–752, § 8(a), 74 Stat. 895.

Fed. Rules Civ. Proc, 28 USC

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment,

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release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed Rules Civ. Proc R. 8, 28. USC,

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Plendings. All pleadings shall be so construed as to do substantial justice.

Fed. Rules Civ. Proc. 28, USC

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings 28 USC

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

28, USC

(d) Preliminary Hearings. The defenses specifically enumerated (1)—(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received. As amended Dec. 27, 1946, effective March 19, 1948.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

28 USC

Rule 26. General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under

Rule 50. Motion for a Directed Verdict

(a) **Motion for Directed Verdict: When Made; Effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) **Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) **Same: Conditional Rulings on Grant of Motion.** (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on

appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such

further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-281

Marcus A. Arnheiter,

Petitioner,

vs.

Neil Sheehan, Random House, Inc., and National Broadcasting Company, Inc.,

Respondents.

Marcus A. Arnheiter,

Petitioner,

vs.

Dell Publishing Co., Inc., Neil Sheehan, and Random House, Inc.,

Respondents.

Donald A. Brownlow,

Petitioner,

vs.

RCA Corporation, National Broadcasting Company, Inc., Random House, Inc., Doubleday & Co., Inc., Dell Publishing Co., Inc., Raritan Enterprises, Inc., Johnny Carson and Neil Sheehan,

Respondents.

Motion For Order To Correct Petition For Writ of Certiorari Docketing Date or in the Alternative For One Day Extension Of Time, and Affidavit and Brief In Support Thereof

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Woodcliff Lake,
New Jersey 07675
(201) 391-9887

Index

List of Authorities Cited

Others :

Petitioners move the Court for an order to correct petition for writ of certiorari docketing date, from August 17, 1979,as indicated by the Clerk, to August 16, 1979,when at about 11:30 P.M. receipt was acknowledged by Federal Court security guard. Acknowledgement of receipt had been stamped on the original of said petition and a file copy,both upon the caption page (see schedule "A" annexed to affidavit in support of within motion) and on file copy of letter of enclosure to Clerk and the respondents' attorneys (see schedule "B" annexed to affidavit aforesaid).

The final day within which to file said petition was August 16, 1979 and service upon respondents' attorneys was made by mail delivered on time to the main office in Washington D.C.(see schedule "C" annexed).

At the same time that the required number of copies of said petition were being served by mail upon the attorneys for respondents, by petitioner Marcus A. Arnheiter, his attorney, Leon S. Wolk was to deliver a package containing original and thirty nine copies of said petition, letter of enclosure and filing fee check to the Clerk.

Wolk and petitioner,having experienced some mechanical problem with duplicating facilities in New Jersey, elected to travel to Washington D.C. to complete the remaining one half, yet undone. They arrived at the Union Station in Washington D.C. and advised by telephone conversation,Jennie H. Lazowski, assistant to the Clerk of the need for a one day extension of time,because the completion of duplication would require time beyond 5:00 P.M..She

advised that, until 12:00 midnight, timely filing could be had by delivering the required number of copies of the petition and filing fee to a duty security guard for the court who would acknowledge receipt. At about 11:30 P.M. on August 16, 1979 this was done. It was not until August 17, 1979, that Wolk was advised , that he had delivered same, to a security guard for the court, who had advised orally and in writing (see schedule "A" and "B" annexed to affidavit and signed original caption page of petition in Clerk's possession) to the effect that he had authority to receive same for the Supreme Court of the United States. Compare affidavit annexed. In response to Wolk's questions, if the guard had advised that he could not receive petitions on behalf of this Court, enough time remained to deliver same on August 16, 1979 to a security guard in the

Supreme Court building, rather then in a different Federal Court building located in Washington D.C. where the delivery was actually made, in detrimental reliance of representations to the contrary. The Clerk should be estopped to deny the filing of said petition as of August 16, 1979. The Clerk upon review of said petition, accepted same on the next day, in accordance with established custom regarding after hours filing, however contrary thereto, acknowledged same, not as of August 16, but as of August 17, 1979.

Under the circumstances, and to prevent injustice, this Court should enter an order to correct the filing date to August 16, 1979, within time as provided by Court Rules, Statutes and case law, or in the alternative this Court grant a one day extension of time , until August 17, 1979.

Brief of Law

I- THE CLERK OF THE COURT IS ESTOPPED TO DENY THE TIMLINESS OF THE FILING OF PETITION AS OF AUGUST 16, 1979 AND THIS COURT SHOULD SO ORDER.

Rule 1,28 U.S.C. provides;

"1. The clerk of this court shall reside and keep the office at the seat of the National Government, ...".

"2.The clerk's office will be open from 9:00 A.M. to 5:00 P.M. Mondays through Fridays,...".

28 U.S.C. 452 provides;

" All courts of the United States shall be deemed always open for the purpose of filing proper papers...".

Included within the definition of "courts of the United States " are the Supreme Court of the United States and district courts. Washington D.C. is "the seat of National Government" and there is no provision of either the statutes or the Rules of this Court that restrict the Clerk

to the physical confines of the actual building wherein this Court is located . Absent a statutory regulation, the Clerk, may,but need not, perform official duties away from his office,provided it is within Washington D.C..

A ministerial act,such as the filing of papers, is not void ,although performed away from his office.People v. Fletcher, 3 Ill. 482 where a bond was filed and received outside of the court.See also, Janesville Hay Tool Co. v. Boyd , 13 S.E. 381, 35 W. Va. 240,Helena First Nat. Bank v. Batchelder Egg Case Co. , 51 Fed.137, 138,People's Sav. Bank,etc.,Co. v. Batchelder Egg Case Co, 51 Fed.130.

Consistent with the courts being always open for the filing of proper papers, a custom exists whereby,

"... the Clerk has permitted counsel to perfect a filing after the close of business on the due date.This can be done-and has been done-by leaving the requisite copies of the petition,the filing fee, and other papers with the Supreme Court Building guard inside the ground-level enterance before the midnight hour.The guard will indicate on the package or papers the precise time when they were received and will see that they are transmitted to the Clerk's Office at the opening of business the following morning.Upon request,the guard will provide a signed receipt, giving the time when the papers were delivered. ... no guarantee that the Clerk will accept the papers for filing...."

Supreme Court Practice, Fifth Edition, Stern, Robert L., Gressman.Eugene,The Bureau of National Affairs, Inc., Wash, D.C. 1978, p. 418 . In the instant petitions the Clerk did accept the papers for filing on the following morning after they had been received within time by a federal court security guard,on behalf of the Clerk of this Court, but in a different court

building located in Washington D.C..

The Clerk should be estopped to deny that the filing of petition and filing fee and letter of transmittal were all received, on his behalf, on August 16, 1979 at about 11:30 P.M.. But for the representations by the security guard that he was authorized to receive same on behalf of the Clerk of the Supreme Court of the United States petitioners' counsel,with motor transportation waiting outside, could have delivered said petition and filing fee to the security guard in the Supreme Court building before August 17, 1979.

The security guard was acting within the scope of his actual or apparent authority when his oral and written representations were relied upon by petitioners to their detriment.

Pacific Far East Line, Inc. v. United States, 394 F.2d 990,1003,184 Ct.Cl. 169,194(1968).Petitioners should not under these circumstances suffer the injustice of having their petitions dismissed for lack of jurisdiction, merely because of a technical non compliance. In re Petition of LaVoie, 349 F. Supp.68 (1972). There should be no objection to use of estoppel in the case sub judice since it will benefit only these two petitioners, Arnheiter and Brownlow, and no general public function or property is jeopardized. Also petitioners are not seeking to take advantage of government inaction,but rather, instead have relied on its advice in good faith and to their detriment. Had accurate answers been given to questions the petitions most certainly would have been filed on time in the Supreme Court building. Pomeroy, Equity Jurisprudence, 801-21(5th Ed), Moser v. United States,341 U.S. 41,where the government was estopped though acting in a sovereign capacity. Walsonavich v. U.S., , (CA 3 Pa) 335 F.2d 96,

Smale & Robinson, Inc. v. v. U.S., (1954 DC Cal) 123 F. Supp. 457, Branch Banking & Trust Co. v. United States, (1951) 120 Ct Cl 72,98 F. Supp 757 cert. den. 342 U.S. 893,Schuster v. Commissioner, (1962, CA 9) 312 F.2d 311

II- THIS COURT HAS THE JURISDICTION IN A CIVIL ACTION TO GRANT AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI SUBSEQUENT TO DUE DATE,AND SHOULD SO ORDER,IN THE INSTANT PETITION.

The decisions of this Court draw a distinction between civil cases and criminal cases and a comparison of 28 U.S.C. 2101(c) and Rule 22(1,2,3, and 4), 28 U.S.C.. Compare;Department of Banking v. Pink, 317 U.S. 264, 268, Matton Steamboat Co. v. Murphy, 319 U.S. 412,Citizens Bank v. Opperman, 249 U.S.448,450 and Schact v. United States, 398 U.S. 58,63-64.It should be noted however that 28 U.S.C. 2101 (c) expressly provides for an extension of time not to exceed an additional sixty days for filing petition, without restricting

such extension, to the making of such application, at least ten days, prior to due date. An ambiquity exists between the language of the statute which provides at the same time for a ninety day limitation and extension for an additional sixty days and Rule 34(2), 28 U.S,C.Only the rule of this Court provides that application of extension of time must be prior to expiration of due date. Mr. Justice Harlan's concurring opinion in the Schact case supra, 398 U.S. at 68 in a criminal case relating to this Court's jurisdiction in the interest of justice to relax its own rules, is also applicable to civil cases. 18 U.S.C. 3772, American Farm Lines v. Black Ball, 397 U.S. 532,539.

28 U.S.C. 2101(c) expressly restricts the jurisidiction of this Court, regarding civil petitions for a writ of certiorari, but to no more, than one hundred and fifty days, from entry of judgment, without encroaching on this Court's discretion to

grant the time extension, prior or subsequent to, expiration of ninety day period . In the instant petitions, assuming per argumndo that the filing was untimely under Rule 22(3) and the doctrine of estoppel is not applicable, all that is needed is an extension of one day in the interest of justice. After seven years of litigation, equity and justice would seem to require that the petitions of Arnheiter and Brownlow be considered on their merits and not dismissed ,on a filing technicality of one day, for lack of jurisdiction.

8/31/79

Respectfully submitted

Leon S. Wolk Esq.

Affidavit In Support of Motion

State of New Jersey)
: ss.
County of Bergen)

Leon S. Wolk Esq., being of full age and duly sworn upon his oath, deposes and says:

1. I am the attorney for petitioners.

2. On August 16, 1979 while completing the duplication and final revision of petition for certiorari with Marcus A. Arnheiter, we experienced a mechanical breakdown in duplicating facilities, after about one half of the complete petition had been coupleted late in the evening of August 15, 1979. After failing to repair the machine we completed the final revision of the last half of the petition and elected to travel by train to Washington D.C. to complete the duplication. We arrived in the Union Station at about 3:30 P.M. and made arrangements to complete the duplication at a Xerox facility

just outside of Washington D.C.. Before leaving the train terminal, I telephoned the Clerk's office requesting information for obtaining a one day extension of time. I estimated that the duplication could not be completed until after 5:00 P.M. on August 16, 1979. I inquired if it would be possible to file an incompleted petition and file the next day the completed petitions. I was advised at that time in conversation with Coleman Williams and Jennie H. Lazowski in the Clerk's office, that I had to file completed petitions and could not file incomplete petitions. I was also advised that an extension of time application would violate the ten day rule. I was told that I could file before the expiration of the due date if I delivered to the security guard in the court building the forty copies of the completed petition and the one hundred dollar check for filing

fee. before 12:00 : midnight
on August 16, 1979, the due date.

3. Both I and Arnheiter than went to the Xerox facility located just outside Washington D.C. to complete the duplication. The manager advised, that it would be quicker to duplicate again the completed first half of the petitions so as to take advantage of existing Xerox collating equipment. This was done and all of the duplication, binding and assembling work was completed by about 10:45 P.M.. The manager suggested that he would drive us into Washington D.C. in a Xerox delivery van. To save time Arnheiter was taken to the Main Post office to mail three copies each to the three attorneys for respondents and receive proof of mailing.("C" annexed). I was to be driven to the Supreme Court building

to deliver to the security guard the signed original and thirty nine copies of said petition, original letter of transmittal and filing fee. I told the Xerox employee to take me to the Supreme Court building, and he repeatedly advised that he knew where it was . The Xerox van stopped outside of a court house building which I was told was the Supreme Court building and I proceeded up some steps and met a security guard. I asked " Is this where I file papers for the United States Supreme Court?" He answered "yes". I told him that I had a large package of forty copies of a petition for writ of certiorari and opened the box and removed the original petition in which I had placed my check for one hundred dollars. I showed him that the original had been signed by me and asked "Is the check made out properly" and read to him and showed him

that it was made payable to the United States Supreme Court Clerk.He said " It is correct ". I asked him to stamp the caption cover sheet of the original petition while showing him and reading to him the words " In The Supreme Court of the United States" He stamped it received and I was advised on August 17, 1979 that it was in the possession of the Clerk of this Court together with original letter of transmittal and filing fee check.I had also asked the security guard to stamp my file copy of said letter of transmittal , which he did ("B" annexed) while I again read to him and requested he stamp it close to the address "Office of the Clerk United States Supreme Court, Supreme Court Building, Washington D.C. ". I also asked the security guard to stamp my file copy of the caption cover sheet of said petition, which he did ("A" annexed). The delivery and acknowledged receipts

and entire conversation with the court security guard was completed by about 11:30 P.M. on August 16, 1979. The Xerox delivery van and manager and the driver waited outside the court house. Had I been told during my conversation with the security guard that I was not in the Supreme Court building and that he was not authorized to acknowledge receipt for the Clerk of this Court during my repeated references in our coversation,I had ample remaining time to be driven to the Supreme Court building and give to its security guard before midnight of August 16, 1979, the above described package. I relied upon the oral and written representations of the court security guard to the detriment of petitioners. It was not until the morning of August 17, 1979, that I was advised, that I had delivered the petition to a federal court security guard, but not

in the Supreme Court Building. I had several telephone conversations on August 17, and thereafter with Jennie H. Lazowski assistant to the Clerk and on August 21,1979 with Michael Rodak Jr. Clerk and upon being advised that said petition would be docketed as of August 17, 1979, I objected thereto and advised that I would file the within motion to the entire Supreme Court of the United States.

4. Although admitted to this Court on June 6, 1960 I was a stranger to Washington D.C. having only been to the Supreme Court building during the day, in 1960 and several years later as a tourist.This was the first time I attempted to go to the building for pending litigation.

Leon S. Wolk Esq.

Sworn and subscribed 9/1/79 before me a New Jersey Attorney authorized to administer oaths

Yale I Lazris Esq.
New Jersey Attorney

-VII-

IN THE SUPREME COURT OF THE UNITED STATES
October Term,1979

No.

Marcus A. Arnheiter,
Petitioner,
vs.
Neil Sheehan, Random House,Inc.,and National Broadcasting Company,Inc.,
Respondents.

Marcus A. Arnheiter,
Petitioner,
vs.
Dell Publishing Co., Inc., Neil Sheehan,and Random House,Inc.,
Respondents.

Donald G. Brownlow,
Petitioner,
vs.
RCA Corporation, National Broadcasting Company, Inc.,Random House,Inc.,Double-day & Co., Inc.,Dell Publishing Co.,Inc., Raritan Enterprises, Inc.,Johnny Carson and Neil Sheehan,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Leon S. Wolk
Counsel for Petitioners
31 Wildwood Road
Woodcliff Lake,
New Jersey 07675
(201) 391-9887

(A)

(B)

RECEIVED
AUG 16 1979

August 16,1979

Office of the Clerk
United State Supreme Court
Supreme Court Bldg
Washington, D.C.

Re: Arnhhiter v. Sheehan et.als.
Arnhéiter v. Dell et. als.
Brownlow v.RCA etc. et. als.

Dear Sir,

I am this day hand delivering fee of $100.00 together with forty copies of petition for writ of certiorari for all three above cases. I am this day serving three copies of said petition upon each of the hereinafter named attorneys for respondents.as an enclosure to this letter this day mailed.

Arnhéiter v Sheehan et. als. 78-7538
Arnhéiter v Dell et. als. 78-7539
Coudert Brothers
attorneys for all repondents
200 Park Avenue
New York, N.Y. 10017
Brownlow v. RCA etc. et als 79-7002
Coudert Brothers
attorneys for "RCA","NBC",
Random House Inc.
Raritan Enterprises Inc.
Neil Sheehan
Shaw and Stedina Esqs.
350 Madison Ave. Attorneys for Johnny Carson
New York, N.Y.
Saterlee & Stephens Esqs.
277 Park Ave. Attorneys for "Doubleday" & "Dell"
New York, N.Y. 10017

Very truly yours,

Leon S. Walk Esq.

LSW/wl
enclo.
c.c. as above indicated

P16 9032974

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO: SATERLEE + STEPHENS
STREET AND NO.: 277 PARK AVE
P.O., STATE AND ZIP CODE: NY NY 10017

POSTAGE	$2.72
CERTIFIED FEE	.80
SPECIAL DELIVERY	¢
RESTRICTED DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED	¢
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
TOTAL POSTAGE AND FEES	$3.52
POSTMARK OR DATE	AUG 16 1979

CONSULT POSTMASTER FOR FEES
OPTIONAL SERVICES
RETURN RECEIPT SERVICE

WASHINGTON, DC MAIN OFFICE

Form 3800, Apr. 1976

P16 9032972

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO: SHAW & STEDINA
STREET AND NO.: 350 MADISON AVE
P.O., STATE AND ZIP CODE: NY NY 10017

POSTAGE	$2.72
CERTIFIED FEE	.80
SPECIAL DELIVERY	¢
RESTRICTED DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED	¢
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
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SENT TO: COUDERT BROS
STREET AND NO.: 200 PARK AVE
P.O., STATE AND ZIP CODE: NY NY 10017

POSTAGE	$2.72
CERTIFIED FEE	.80
SPECIAL DELIVERY	¢
RESTRICTED DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED	¢
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
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OPTIONAL SERVICES — RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
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NOV 16 1979

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	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
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NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO
SATERLEE + STEPHENS
STREET AND NO.
277 PARK AVE
P.O., STATE AND ZIP CODE
NY NY 10017

POSTAGE		$ 2.72
CONSULT POSTMASTER FOR FEES	CERTIFIED FEE	80¢
	SPECIAL DELIVERY	¢
	RESTRICTED DELIVERY	¢
OPTIONAL SERVICES — RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	¢
	SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	¢
	SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	¢
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	¢
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WASHINGTON, DC MAIN OFFICE
USPO SMOOWIN
NOV 16 1979

PS Form 3800, Apr. 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-281

MARCUS A. ARNHEITER,

Petitioner,

—against—

NEIL SHEEHAN, RANDOM HOUSE, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

MARCUS A. ARNHEITER,

Petitioner,

—against—

DELL PUBLISHING CO. INC., NEIL SHEEHAN, and RANDOM HOUSE, INC.,

Respondents.

DONALD G. BROWNLOW,

Petitioner,

—against—

RCA CORPORATION, NATIONAL BROADCASTING COMPANY, INC., RANDOM HOUSE, INC., DOUBLEDAY & COMPANY, INC., DELL PUBLISHING CO. INC., RARITAN ENTERPRISES, INC., JOHNNY CARSON and NEIL SHEEHAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

CARLETON G. ELDRIDGE, JR.
JOSEPH A. MCMANUS
COUDERT BROTHERS
Attorneys for Respondents Neil Sheehan, Random House, Inc., National Broadcasting Company, Inc., Dell Publishing Co. Inc., RCA Corporation, and Raritan Enterprises, Inc.
200 Park Avenue
New York, New York 10017

PAMELA G. OSTRAGER
SUSAN B. ROTHSCHILD
Of Counsel

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TABLE OF AUTHORITIES

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
NO.79-281

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

This consolidated Petition brings to the attention of the Court decisions reached below in three separate actions, namely two libel actions entitled respectively Arnheiter v. Neil Sheehan, et al., 72 Civ. 2601 (S.D.N.Y. 1972), and Arnheiter V. Dell Publishing Co., Inc., et al. 73 Civ. 2742 (S.D.N.Y. 1973) (hereinafter "the Arnheiter actions"), and an antitrust action entitled Brownlow v. RCA Corporation, et al., 78 Civ. 2668 (S.D.N.Y. 1978) (hereinafter "the Brownlow action"). To the extent that the arguments in opposition to the Petition by respondents in these three actions are the same, such arguments will be presented collectively. However, to the extent that the Petition raises separate considerations in regard to the Arnheiter actions and the Brownlow action, these considerations will be addressed individually by respondents.

OPINIONS BELOW

A. The Arnheiter Actions

The opinions of the United States Court of Appeals for the Second Circuit are unreported;

copies of the opinions are reproduced at B-18 and C-20 of the Appendix to the Petition. The United States District Court for the Southern District of New York did not render a written opinion in these actions but issued its ruling in open court. Although the Petition purports to include the transcript of the District Court's ruling in the Appendix thereto (A-1 to A[i], 17), only portions of the transcript have been included.

B. The Brownlow Action

The opinion of the United States Court of Appeals for the Second Circuit is also unreported; a copy of this opinion is reproduced at E-27 of the Appendix to the Petition. The opinion of the United States District Court for the Southern District of New York, also unreported, is reproduced at D-22 of the Appendix.

JURISDICTION

Judgments in the three actions which are the basis for the Petition were entered by the Second Circuit on May 18, 1979. While the

Petition purports to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1), it was not filed with the Clerk of the Supreme Court until August 17, 1979, ninety-one days after entry of the judgment sought to be reviewed. In that Congress has provided in 28 U.S.C. § 2101(c) with regard to judgments in civil actions that a writ of certiorari shall be "applied for within ninety days after the entry of such judgment or decree," the Petition was not timely filed; and therefore, this Court is without jurisdiction to hear the Petition.

QUESTIONS PRESENTED

A. The Arnheiter Actions

The Petition presents as questions for the review of this court issues which have been consistently rejected by the lower courts as well as matters which are not justiciable in this Court. Such questions clearly do not present the "special and important reasons" which must be present for such review to be had according to Rule 19 of the Rules of this Court.

In this connection, should this Court not deny this Petition outright for lack of jurisdiction, the determinative question is as follows:

> Is petitioner, a public figure/public official, entitled to relief from this Court when, after four years of discovery, he did not meet his burden of proving that a paperback edition of a book, previously ruled to have been published in hardcover form without actual malice, was published with actual malice or that an interview of the author concerning the book was broadcast with actual malice?

B. The Brownlow Action

The Petition purports to present only one question for review in connection with this action, which question is as follows:

> "Whether a complaint alleging a conspiracy in violation of antitrust statute with overt act in furtherance thereof within limitations period, should be dismissed where leave to amend is pending and there has been no discovery as to other concealed overt acts unknown to petitioner at the commencement of action [sic]."

The conclusory statement which the Petition presents as the sole question for review by this Court in connection with the Brownlow action also clearly does not present the "special and important reasons" which must be present for such review to be had according to Rule 19 of the Rules of the Supreme Court. Indeed,

should this Court not deny this Petition outright for lack of jurisdiction, only one question need be reached on the merits to determine whether the Petition should be granted:

> Should this Court review a case in which none of the considerations set forth in Rule 19 of the Rules of the Supreme Court is present and in which both Courts below found that the complaint failed to allege the occurrence of an overt act in furtherance of the antitrust conspiracy therein alleged within the applicable limitations period set forth in 15 U.S.C. §15b?

CONSTITUTIONAL PROVISION INVOLVED

In connection with the Arnheiter actions, the First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASES

A. The Arnheiter Actions

In February 1972, respondent Random House, Inc. (hereinafter "Random House") published, in hardcover form, a book entitled The Arnheiter Affair (hereinafter "the book"), authored by respondent Neil Sheehan, concerning the events which occurred during the command of Marcus A. Arnheiter, petitioner in the Arnheiter actions, of the U.S.S. Vance, a Navy warship on patrol duty off the coast of Vietnam. On February 25, 1972, Arnheiter commenced an action in the United States District Court for the Northern District of California alleging, inter alia, libel by virtue of that publication (hereinafter the "hardcover action").

On April 11, 1972 Sheehan was interviewed on "The Tonight Show", a program aired over the facilities of respondent National Broadcasting Company, Inc. (hereinafter "NBC"), concerning the book; on June 20, 1972, Arnheiter commenced an action alleging libel by virtue of that broadcast (hereinafter the "broadcast action"). In February 1973,

respondent Dell Publishing Co. Inc. (hereinafter "Dell") published the paperback edition of the book under a license from Random House; on June 20, 1973, Arnheiter commenced an action alleging libel because of that publication (hereinafter the "paperback action"). The broadcast and paperback actions (but not the hardcover action) are the subject of this Petition together with the antitrust action brought by petitioner Donald G. Brownlow.

On October 31, 1975, the District Court for the Northern District of California granted Sheehan and Random House judgment dismissing the complaint in the hardcover action on the ground that Arnheiter had not, and could not with further discovery, meet his burden of proving that any portion of the book claimed to be false and defamatory was written or published with knowledge of any falsity or reckless disregard for the truth. That decision was affirmed by the Ninth Circuit on July 17, 1978. Arnheiter v. Random House, Inc., 578 F.2d 804. Arnheiter did not seek Certiorari from that decision until September, 1979, after the Northern District of California Court denied his motion to vacate its judgment.

Following the grant of judgment by the

Northern District of California in the hardcover action, respondents moved for judgment dismissing the complaint in the paperback and broadcast actions on the grounds of res judicata and collateral estoppel, asserting that they were entitled to this relief because, inter alia:

a. Arnheiter, acting through counsel, subscribed to a sworn statement:

   (i) Conforming the pleadings in the paperback action to those pending in the hardcover action, and

   (ii) Setting forth his libel claims thereby proving that there was a language equivalent in the paperback and hardcover actions for each section of the text of the broadcast claimed to be defamatory; and

b. Arnheiter had simultaneously conducted discovery in all three actions for over three and one-half years.

On March 16, 1978, the District Court denied the motion on the ground that Arnheiter should be given the opportunity to prove that subsequent to the time of publication of the hardcover edition of the book, respondents gained knowledge which would have caused the

paperback to have been published or the broadcast to have been made with actual malice.

On May 10, 1978, respondents made a second motion for summary judgment, on the ground that Arnheiter could not meet his burden of proving that the paperback edition of the book was published with actual malice or that the words spoken during "The Tonight Show" interview and broadcast by NBC were spoken or broadcast with actual malice. When that motion was sub judice, the Court called the parties to trial. However, upon the action coming on for trial on September 11, 1978, the Court determined that it was not persuaded that Arnheiter had sufficient evidence to defeat the May 10, 1978 motion for summary judgment and ruled that his counsel should have an opportunity to reveal orally to the Court what evidence would be presented at trial which would defeat summary judgment.

After hearing the statement of the evidence made by Arnheiter's counsel, respondents' statement in support of the entry of judgment on the basis of such evidentiary statement, and reargument by counsel for

Arnheiter, the Court reconsidered the motion for summary judgment and ruled that:

1. Arnheiter had not met his burden under New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny of proving with convincing clarity that the April 11, 1972 interview of Neil Sheehan on "The Tonight Show" was broadcast with actual malice or that the paperback edition of the book was published with actual malice;

2. All of Arnheiter's claims of libel with respect to the book had been previously ruled nonactionable (Arnheiter v. Random House, Inc., et al., 578 F.2d 804 (9th Cir. 1978), and Arnheiter presented no proof that the April 11, 1972 interview of Sheehan with respect to the book was broadcast with actual malice or that the book was republished in paperback form with actual malice; and

3. Arnheiter had had sufficient discovery and opportunity to come forward with any fact which would defeat summary judgment.

Judgment was entered in both actions on October 2, 1978.

On May 16, 1979, the Second Circuit Court of Appeals entertained argument in the paperback and broadcast actions, as well as the Brownlow action. On May 18, 1978, the Court

issued opinions affirming the District Court's decision in both actions. In connection with the broadcast action, the Court ruled as follows:

> "Relying on principles of res judicata and collateral estoppel, we note that the Ninth Circuit has already judged the hardcover version of "The Arnheiter Affair" under the standard of actual malice enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and concluded that neither the author Neil Sheehan nor Random House, Inc. published the hardcover with knowledge of its falsity or with reckless disregard for the truth. Arnheiter v. Random House, Inc., 578 F.2d 804 (1978). Appelant has failed to come forward with proof that, subsequent to the publication of the hardcover version of the book, any of the appellees obtained knowledge that any statement in the book is false. Therefore, appellant has not met his burden under New York Times Co. v. Sullivan, supra, of providing clear and convincing proof that the April 11, 1972 interview of Neil Sheehan on "The Tonight Show" was broadcast with actual malice."

The Court's decision in the paperback action was virtually identical:

> "Relying on principles of res judicata and collateral estoppel, we note that the Ninth Circuit has already judged the hardcover version of "The Arnheiter Affair" under the standard of actual malice enunciated in New York Times Co.

v. Sullivan, 376 U.S. 254 (1964), and concluded that neither the author Neil Sheehan nor Random House, Inc. published the hardcover with knowledge of its falsity or with reckless disregard for the truth. Arnheiter v. Random House, Inc., 578 F.2d 804 (1978). Appellant has failed to come forward with proof that, subsequent to the publication of the hardcover version of the book, any of the appellees obtained knowledge that any statement in the book is false. Therefore, appellant has not met his burden under New York Times Co. v. Sullivan, supra, of providing clear and convincing proof that the paperback edition of the book was published with actual malice."

B. The Brownlow Action

Petitioner Donald G. Brownlow is the author of a manuscript entitled "The Albatross" which was completed by him in 1973; the subject of "The Albatross" is Mr. Arnheiter. On June 12, 1978, Brownlow commenced an antitrust action against those parties named as defendants in the Arnheiter actions, and in addition naming as defendants Doubleday & Company, Inc. (hereinafter "Doubleday"), corporate parent of Dell, RCA Corporation (hereinafter "RCA"), the corporate parent of

NBC and Random House, Johnny Carson, host of "The Tonight Show", and Raritan Enterprises Inc. (hereinafter "Raritan"). *

The factual allegations upon which Brownlow based his antitrust claims, as determined by the District Court in its opinion dated November 6, 1978, are as follows:

> "Reading the complaint in the light most favorable to the plaintiff, the Court finds that it alleges the following:
>
> 1. Sometime in 1971, defendant Sheehan completed "The Arnheiter Affair," an account of Marcus Arnheiter's command of the U.S.S. Vance, a command from which the Navy abruptly relieved Arnheiter after 99 days.
>
> 2. From 1971 through 1973, defendants Dell Publishing Co., Inc., Doubleday & Co., Inc., Random House, Inc., and RCA Corporation ['the publishing defendants'] published 'The Arnheiter Affair,' promoting it as a factual analog of Herman Wouk's classic, 'The Caine

*Raritan, which had previously produced "The Tonight Show", is no longer in existence having been merged into NBC on April 11, 1975.

Mutiny,' publication rights of which are licensed to Dell and Doubleday.

3. In April 1972, defendants Johnny Carson, Raritan Enterprises, Inc., and National Broadcasting Co., Inc. ['the broadcasting defendants'] produced and broadcasted a segment of 'The Tonight Show' during which Sheehan appeared as a guest and discussed in considerable detail 'The Arnheiter Affair.' Neither Sheehan nor any of the publishing defendants paid a fee for Sheehan's appearance to any of the broadcasting defendants.

4. Each of the defendants were to share in some way in the profits of 'The Arnheiter Affair.'

5. In 1973, plaintiff completed 'The Albatross,' an account of the same events, which, in many material aspects, differs from Sheehan's.

6. Sometime in 1973, Sheehan stated that plaintiff would be unable to find a publisher for 'The Albatross.'

7. None of the defendants have ever agreed to publish or promote 'The Albatross.'

8. None of the defendants have ever agreed to provide plaintiff free television broadcast time to promote 'The Albatross' "*

---

*Additionally, the complaint alleged that Dell had been acquired by Doubleday in 1976.

On or about August 15, 1978, respondents RCA, NBC, Random House and Raritan moved to dismiss the complaint under Rule 12 (b)(6) of the Federal Rules of Civil Procedure, in which motion the other respondents later joined. Respondents' motion to dismiss was based on the fact that the complaint made no allegations tending to show a conspiracy, or any action taken in concert by respondents which had any connection with Brownlow, or indeed, any injury suffered by him arising out of any act by respondents. Additionally, such complaint failed to offer any definition of the market respondents allegedly conspired to monopolize, other than "the publishing industry," and failed to allege any matter tending to show that respondents willfully acquired or maintained monopoly power in any market.

Further, those facts alleged by Brownlow in support of his price discrimination claim, i.e., Sheehan's appearance on "The Tonight Show," affirmatively demonstrated that no such claim existed in that an appearance on a television show is not a "commodity", and Brownlow was not a "purchaser" of such "commodity". Finally, respondents' motion to dismiss was also based on the fact that the factual allegations made in the complaint demonstrated that such action

was barred by the applicable statute of limitations, in that the complaint alleged no fact occurring within the limitations period other than the 1976 merger of Dell into Doubleday.

In opposing that part of respondents' motion to dismiss addressed to the statute of limitations, Brownlow appeared to rely primarily on the maintenance of two goverment actions, United States v. National Broadcasting Company, Inc., Civ. No. 74-3601 - RJK (C.D. Calif. 1974) which challenged NBC's prime time television entertainment programming practices, and that of United States v. CBS, Inc., 78 Civ. 2491 (S.D.N.Y. 1978) which challenged the acquisition by CBS (not a defendant in any of the actions which are the subject of this Petition) of Fawcett Publications, Inc. as in some manner tolling the running of the limitations period under 15 U.S.C. §16(i). In granting such motion on November 6, 1978, the District Court, while not expressly ruling on the question of whether Brownlow had properly pleaded a cause of action under the antitrust laws, based its decision on the following grounds:

> "In support of his complaint, the plaintiff advances essentially only one legal theory: that the defendants' conduct amounts to a conspiracy to violate the antitrust laws. Even if the Court were to accept this theory, however, the plaintiff's claim would be barred by the four-year statute of limitations prescribed by 15 U.S.C. §15b. The complaint, filed in this Court on June 12, 1978, fails to allege a single overt act that occurred after June 12, 1974, in furtherance of the alleged conspiracy. 'A "right of action for a civil conspiracy under the antitrust laws accrues from the commission of the last overt act causing injury or damage.'" Peto v. Madison Square Garden Corp., 384 F.2d 682, 683 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968) (quoting Garelick v. Goerlich's, Inc., 323 F.2d 854, 855 (6th Cir. 1963)). Furthermore, the Court rejects plaintiff's assertion that the statute of limitations was tolled during the pendency of two actions brought by the United States, since the Court finds neither of these actions materially related to the instant complaint. See 15 U.S.C. 16(b); Peto, supra. See generally Leh v. General Petroleum Corp., 382 U.S. 54 (1965)."

Thereafter, judgment was entered dismissing the complaint on November 29, 1978, following which Brownlow filed his Notice of Appeal on December 4, 1978. During the course of such appeal, he advanced for the first time the argument that the 1976 merger of Dell into Doubleday was accomplished pursuant to the

conspiracy alleged in his complaint to promote Sheehan's book (published in 1972) and to suppress his book.

Oral argument on Browlow's appeal was heard by the Court of Appeals for the Second Circuit on May 16, 1979 at the same time as the appeal in the Arnheiter actions was heard; and on May 18, 1979, judgment was entered by the Court of Appeals, affirming the decision of the District Court on the grounds that:

> "Appellant's claim that defendants conspired to violate the antitrust laws is barred by the four-year statute of limitations under 15 U.S.C. §15b. The complaint, filed in the district court on June 12, 1978, failed to allege that a single overt act in furtherance of appellees' purported conspiracy occurred after June 12, 1974. The allegation in the complaint that, effective June 1, 1976, appellee Dell Publishing Co., Inc. became a wholly owned subsidiary of appellee Doubleday & Co. in furtherance of the conspiracy does not remove the case from the statute of limitations. Appellant could in no way be injured by a combination between Dell and Doubleday to promote Neil Sheehan's book, 'The Arnheiter Affair.'"

ARGUMENT

I. The Petition was not filed within the time limitation prescribed by Congress in 28 U.S.C. §2101(c); therefore, this Petition must be denied for want of jurisdiction.

The time limitation applicable to the filing of the instant Petition is that set forth in 28 U.S.C. §2101(c), which section reads in relevant part as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.*

Thus, as this Petition was not filed until August 17, 1979, some ninety-one days after entry of the judgment for which review is sought, it was not timely filed. In such circumstances, this

*While such statute also states that an extension of time in which to apply for a writ of certiorari may be granted "for good cause shown," Rule 34(2) of the Supreme Court Rules requires that any request for such an extension must be filed within the period sought to be extended. Plaintiff did not apply for an extension until well after the time to do so had expired.

Court "has uniformly treated these statutory limitations as jurisdictional and the untimely petition in a civil case accordingly 'must ... be denied for want of jurisdiction,'" R.L. Stern, Supreme Court Practice ¶6.1 at 389 (5th ed. 1978), citing Department of Banking v. Pink, 317 U.S. 264, 268 (1942) and Citizens Bank v. Opperman, 249 U.S. 448, 450 (1919).

As is also set forth in the foregoing text, the jurisdictional requirement of timely filing "is strictly applied in civil cases ...; no matter how extenuating the circumstances, an untimely petition will not be entertained," R.L. Stern, supra. Thus in Deal v. Cincinnati Board of Education, 402 U.S. 962, 964 (1971), this Court denied a petition filed just one day late, even though the delay was apparently caused by the loss by an airline of the petitioner's papers. Similarly, in Teague v. Commissioner of Customs, 394 U.S. 977 (1969) certiorari was denied in the case of petition filed two days late because of an unusually severe snow storn.

Petitioners herein have alleged no reason in the nature of an Act of God or some other event beyond their control to excuse their failure to timely file. Clearly, this Petition must be denied for want of jurisdiction.

II. The decisions reached by the courts below in the Arnheiter actions are not in conflict with the recent decisions of this Court cited in the Petition.

The Court below ruled in the Arnheiter actions that his complaints with respect to the dissemination of facts and opinions contained in the book were barred by the principles of res judicata and collateral estoppel, and that he had failed to present any evidence that republication of those facts and opinions in the paperback edition of the book or broadcast concerning that book had been done with actual malice. These rulings were made after Arnheiter had engaged in extensive and wide-sweeping discovery for four years.

Accordingly, there is no reason for this Court to grant Arnheiter a writ of certiorari. The contention made in the Petition that this Court's decisions in Hutchinson v. Proxmire, 47 U.S.L.W. 4827 (U.S. June 26, 1979), Wolston v. Reader's Digest Assoc., 47 U.S.L.W. 4840 (U.S. June 26, 1979), and Herbert v. Lando, _U.S._, 60 L.Ed. 115, 99 S.Ct. 1635 (1979), are in conflict with the Second Circuit's rulings is specious.

In both Wolston and Hutchinson, this Court reversed findings of "public figure" status on the ground that the plaintiff had not thrust

himself or his views into a public controversy. Here, the Ninth Circuit ruled that Arnheiter had "used every conceivable effort to gain public exposure and to make his case [the subject of the book] a 'cause celebre.' He successfully courted massive publicity ...," Arnheiter v. Random House, Inc., supra, 578 F.2d at 805. Moreover, the Ninth Circuit ruled that he was a public official:

> "The commmanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites public scrutiny and discussion (Rosenblatt [v. Baer, 383 U.S. 75, 85, 86, n.13 (1966)] and fits the description of a public official under New York Times." Id.

Even if these cases were applicable, Arnheiter never sought review of the decision of the Ninth Circuit in this Court. Thus, the question of Arnheiter's status for purposes of determining his burden of proof was final when the Second Circuit rendered its decisions. Therefore, he is barred by the doctrine of res judicata from using this proceeding as a device to mount a collateral attack on that judgment. IB Moore, Federal Practice, $0.401 at 11-12; $0.405 at 628 (1974). Moreover, Wolston and

Hutchinson are clearly not cases which should be accorded retroactive effect. See Linkletter v. Walker, 381 U.S. 618, 629 (1965).

In any event, petitioner conceded his status in the Second Circuit and cannot be heard to complain now; as the Ninth Circuit Court of Appeals ruled, Arnheiter "qualifies under both the public official and public figure tests and ... the book must be judged against the New York Times standard of actual malice." Arnheiter v. Random House, Inc., supra, 578 F.2d at 805.

With respect to whether petitioner had sufficient discovery, in Herbert v. Lando, this Court rejected the respondent's claim that the First Amendment precluded inquiry into the editional process. This issue was never raised by Arnheiter in either the hardcover, paperback, or broadcast actions. Moreover, Arnheiter has invoked a need for discovery each time it appeared that an action would be terminated.

On the eve of summary judgment in the Northern District of California, Arnheiter filed a motion to stay summary judgment and permit further discovery. That Court ruled:

> "[Arnheiter] has not met and could not, with further discovery, meet the burden placed upon him [by New York Times Co. v. Sullivan]." Arnheiter v. Random House, Inc., Slip op. No. C-72-342 S.W. (N.D. Cal. 1975).

And the Ninth Circuit affirmed:

> "This case was over 3 years old when the summary judgment motion was heard, and a review of the records shows that appellant deposed both appellees and demanded and received Sheehan's research materials. There was no abuse of discretion in not permitting additional discovery." Arnheiter v. Random House, Inc., supra, 578 F.2d at 806.

Yet, Arnheiter continued discovery subsequent to the entry of judgment in the Northern District. On December 29, 1976, a United States Magistrate in the Southern District stated:

> Plaintiff has had extensive discovery respecting all three actions "and defendants have" properly cooperated with the plaintiff's discovery.

Finally, the Southern District of New York ruled:

> As to the application for additional discovery, it is denied. These cases are over six years old.
>
> Moreover, the purpose of a lawsuit is to redress a wrong not to find one. Appendix to Petition, at A-12.

III. No "special and important reasons" exist to support review by this Court of the decisions reached below in the Brownlow action.

As is set forth in Rule 19 of the Rules of this Court, a "review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." In this connection, Rule 23(4) provides that the "failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

In utter disregard of the clear mandate issued by the Rules cited above, the Petition consists of nothing more than a rambling, incoherent replay of those grievances of Marcus Arnheiter which have led to a seemingly endless series of repetitive litigations, all ultimately

determined to be without merit. With particular reference to Brownlow's antitrust claims and the bar imposed on the maintenance of these claims by the applicable statute of limitations, i.e., 15 U.S.C. §15b, the Petition cites nothing to indicate a conflict in relevant decisions of our federal Courts of Appeals, or an important question of federal law not yet settled by this Court; nor does the Petition in any way indicate that the courts below decided a federal question contrary to any decision of this Court, or misused their discretionary power in any way, see, Rule 19.

Brownlow's arguments were fully considered by the Courts below, both of which ultimately determined that he had not set forth the occurrence within the limitations period of any overt act in furtherance of the conspiracy alleged in his complaint. No issue of any significance whatsoever is raised by the Petition herein, let alone one requiring the attention of this Court.

CONCLUSION

The Court being without jurisdiction to hear the Petition, and no issue of significance

or substance having been raised therein, the Petition for a Writ of Certiarari should be denied.

Respectfully submitted,

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